This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

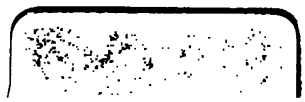
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

U .S .A .
Fla .100
5



CASES ARGUED AND ADJUDGED

IN THE

SUPREME COURT OF FLORIDA,

DURING THE YEARS 1881-82

REPORTED BY

GEORGE P. RANEY,

ATTORNEY-GENERAL.

VOLUME XVIII.

TALLAHASSEE, FLA.:

PRINTED AT THE FLORIDIAN BOOK AND JOB OFFICE.

1882.

Reprinted 1911 By E. O. Painter Printing Co., DeLand. Fla.

BODLEIAN
P
8 JAN 1963
LIBRARY

JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. EDWIN M. RANDALL, Chief Justice.

HON. JAMES D. WESTCOTT, JR., } Associate Justices.
HON. R. B. VAN VALKENBURGH, }

ATTORNEY-GENERAL.

GEORGE P. RANEY.*

CLERK SUPREME COURT.

CHARLES H. FOSTER.

JUDGES OF THE CIRCUIT COURTS.

FIRST CIRCUIT—	HON. AUGUSTUS E. MAXWELL.
SECOND CIRCUIT—	HON. DAVID S. WALKER.
THIRD CIRCUIT—	HON. ENOCH J. VANN.
FOURTH CIRCUIT—	HON. ROBERT B. ARCHIBALD.†
	HON. JAMES M. BAKER.‡
FIFTH CIRCUIT—	HON. JAMES B. DAWKINS.
SIXTH CIRCUIT—	HON. WM. ARCHER COCKE.
SEVENTH CIRCUIT—	HON. H. L. MITCHELL.

---

* Reappointed January 18, 1881. † Term expired. ‡ Appointed February 8, 1881, *vice* R. B. Archibald term expired.

TABLE OF CASES.

	PAGE.
Acosta, Pitt v.,	270
Alden v. State,	187
Allen v. Tison,	628
Baars, Stokes v.,	656
Barnett, Robinson v.,	602
Barnett, Knox v.,	594
Basnett v. Jacksonville,	523
Basnett, McMurray & Brittain v.,	609
Bird v. State,	493
Bisbee, Florida Central Company v.,	60
Blumer v. Pollak & Co.,	707
Bowden, State *ex rel.* v.,	17
Branch v. Cole,	368
Brock v. Doyle,	172
Brown v. State,	472
Buckman, State *ex rel* v.,	267
Burns, State v.,	185
Canova v. Commissioners Baker County	512
Card, Mattair v.,	761
Caro's Executrix, Hyer's Executors v.,	694
Carr v. Thomas	736
Carruth, Hogans v.,	587
Cathcart v. Turner,	837
Chipley v. Frierson,	639
Cole, Branch v.,	368
Commissioners of Baker, Canova v.,	512
Com'ers of Columbia, Com'ers of Suwannee v.,	78
Com'ers of Suwannee v. Com'ers of Columbia,	78
Coogler, McKeown v.,	866
Cook v Cook,	634

PAGE.

Creswell, Seymour & Simpson v., . . . 29
Crump v. Perkins, ... 353

Dawkins, Sedgwick v., ... 335
Deans v. Wilcoxon, ... 531
Dibble, Weiskoph v., ... 22, 24
Doig & Geiger, Thrasher v., . . . 809
Doyle, Brock v., ... 172
Doyle, Wade v., ... 630
Drew, Price v., ... 670
Dunn, Webb v., ... 721

Eagan Ex-parte, ... 194
Edgerton v. Mayor Green Cove Springs, . . 528
E. D. P. v. State *ex rel.*, ... 175
Endell v. Walls, ... 697
Evers and Byrd, Wordehoff v., . . . 339
Ex-parte Eagan, ... 194

Fairchild v. Knight, ... 770
Fernandina, Finegan v., ... 127
Ferris, Harris v., ... 81, 84
Finegan v. Fernandina, ... 127
Florida Central Company v. Bisbee, . . 60
Frierson, Chipley v., ... 639
Fries, Paul v., ... 573

Gazan, Tuten v., ... 751
Gorton v. Paine, ... 117

Hampton, Marvin v., ... 131
Harris v. Ferris, ... 81, 84
Hart v. Sanderson's administrators, . . 103
Hayden & Thrasher, ... 795
Hazen v. State, ... 184
Hewlett, Solary v., ... 756
Hodges v. Price, ... 342
Hogans v. Carruth, ... 587

PAGE.

Hower v. Lewton, ... 328
Hower, Lewton *et al.* v., ... 872
Hubbard, Massey v., ... 688
Hyer v. Vaughn, ... 647
Hyer, Muscogee Lumber Company v. . . 698
Hyer's Executors v. Caro's Executrix, . . 694

Jacksonville, Basnett v., ... 523
Jacksonville, Murphy v., ... 318
Jones v. State, ... 889

King, Sams v., ... 552, 557
Knight, Fairchild v., ... 770
Knox v. Barnett, ... 594

Lake v. State *ex rel.*, ... 501
Lamar v. Palmer, ... 147
Lanier v. Padgett, ... 842
Lewton, Hower v., ... 328
Lewton *et al.* v. Hower, ... 872
Livingston v. Roberts' Executor, . . . 70

Marks, Wilson v., ... 322
Marvin v. Hampton, ... 131
Massey v. Hubbard, ... 688
Mattair v. Card, ... 761
Mayor Green Cove Springs, Edgerton v., . 528
McKeown v. Coogler, ... 866
McMurray & Brittain v. Basnett, . . . 609
Metzger v. State, ... 481
Mills, Stewart v., ... 57
Mitchell v. Wamble, ... 169
Murphy v. Jacksonville, ... 318
Muscogee Lumber Company v. Hyer, . . 698

Nickles v. Philips, ... 732

Oliver v. Snowden, ... 823

PAGE.

Overby v. State, ... 178

Padgett, Lanier v., ... 842
Paine, Gorten v., ... 117
Palmer, Lamar v., ... 147
Parrish v. State, ... 902
Patrick v. Young, ... 50
Paul v. Fries, ... 573
Pentry v. State, ... 191
Perkins, Crump v., ... 353
Philips, Nickels v., ... 732
Pitt v. Acosta, ... 270
Pollak & Co., Blumer v., ... 707
Price v. Drew, ... 670
Price, Hodges v., ... 342
Price, Spratt v., ... 289

Rawlins v. Rawlins, ... 345
Rivas and Koopman v. Solary, . . . 122
Roberts' Executor, Livingston v., . . . 70
Robinson v. Barnett, ... 602
Robinson, Shear v., ... 379
Robinson v. State, ... 898

Sams v. King, ... 552, 557
Sanderson's Adms. v. Hart, . . . 103
Savage v. State, ... 970
Savage and James v. State, . . . 909
Sedgwick v. Dawkins, ... 335
Seymour & Simpson v. Creswell, . . . 29
Shear v. Robinson, ... 379
Smith v. Smith, ... 789
Snowden, Oliver v., ... 823
Solary v. Hewlett, ... 756
Solary, Rivas and Koopman v. . . . 122
Spivey, Ward v., ... 847
Spratt vs. Price, ... 289

PAGE.
Stark, State ex rel. v., ... 255
State, Alden v., ... 187
State, Bird v., ... 493
State, Brown v., ... 472
State v. Burns, ... 185
State ex rel., William H. T. v., . . . 883
State, Hazen v., ... 184
State, Jones v., ... 889
State, Metzger v., ... 481
State, Overby v., ... 178
State, Parrish v., ... 902
State, Pendry v., ... 191
State, Robinson v., ... 898
State, Savage v., ... 970
State, Savage and James v., . . . 909
State, Stevens v., ... 903
State, Wood v., ... 967
State ex rel. v. Bowden, ... 17
State ex. rel. v. Buckman, ... 267
State ex rel., E. D. P. v., ... 175
State ex rel., Lake v., ... 501
State ex rel. v. Stark, ... 255
Stevens v. State, ... 903
Stewart v. Mills, ... 57
Stokes v. Baars, ... 656

Thomas, Carr v., ... 736
Thrasher v. Doig & Geiger, . . . 809
Thrasher, Hayden v., ... 795
Tidwell v. Witherspoon, ... 282
Tison, Allen v., ... 628
Turner, Cathcart v., ... 837
Tuten v. Gazan, ... 751

Vaughn, Hyer v., ... 647

Wade v. Doyle, ... 630

PAGE.

Wamble, Mitchell v., ... 169
Walls, Endell v., ... 697
Ward v. Spivey, ... 847
Webb v. Dunn, ... 721
Weiskoph v. Dibble, ... 22, 24
Whitlock v. Willard, ... 156
Whitney, Young v., ... 54
Wilcoxon, Deans v., ... 531
Willard, Whitlock v., ... 156
William H. T. v. State ex rel., . . . 883
Wilson v. Marks, ... 322
Witherspoon, Tidwell v., ... 282
Wood v. State, ... 967
Wordehoff v. Evers and Byrd, . . . 339

Young, Patrick v., ... 50
Young v. Whitney, ... 54

NOTE.—The head notes in each case were prepared by the Judge who delivered the opinion.

AMENDATORY AND ADDITIONAL RULES OF THE SUPREME COURT.

Rule Adopted May 4, 1880.

Ordered, That the proviso at the end of Rule 25, of the Rules of this Court adopted at April Term, 1873, be, and the same is hereby amended so that the proviso will read as follows:

Provided, That a copy of such order shall be published in some newspaper at the seat of government for three successive weeks, beginning at least thirty days before the day in the term of the Supreme Court at which the hearing shall be had: *And provided further,* That personal service of a copy of the order upon the personal representatives shall be deemed equivalent to and a substitute for publication.

Adopted February 18, 1881.

Ordered, That in all cases in which a record shall come into this court, by appeal or writ of error, consisting of twenty pages or upwards, exclusive of the certificate of the Clerk, and no proper index is filed therewith, the Clerk of this Court shall make an index of such record, giving the date of the filing of each paper, order or instrument in the Court below, the name or character of the instrument, and the page of the record where the same may be found.

Deeds, contracts and the like shall be described by the names of the parties thereto—names of witnesses, and the pages where their testimony may be found shall also be designated. The cost of making such index shall be taxed in the bill of costs.

ERRATA.

VOLUME XVIII FLORIDA REPORTS.

Page 5, in Table of Cases, for "Baker," read "Bradford."

On page 36, 4th line, for "1689," read "1869."

Page 80, last line, for "of," read "by."

Page 151, 24th line, for "mortgage," read "mortgagee."

Page 379, in 3d head note, for "demonstration," read "determination."

Page 470, for "Daw.," read "Dan."

Page 663, for "quatnor," read "quatuor."

Page 665, 2d line, for "excepted," read "except."

Page 667, 29th line, for "servable" read "severable."

Page 667, strike out one "or could."

Page 726, after "charge," in second line, insert "for."

Page 746, 28th line, for "during," read "claiming."

Page 746, 32d line, for "appellees," read "appellant."

Page 768, 21st line, for "court," read "courts."

Page 875, 19th line, for "Jug.," read "Inj."

DECISIONS

OF THE

SUPREME COURT OF FLORIDA.

JANUARY TERM, A. D. 1881.

STATE OF FLORIDA EX REL. GEO. A. PECK, PLAINTIFF IN ERROR, VS. URIAH BOWDEN, DEFENDANT IN ERROR.

1. A debtor who is a member of a partnership engaged in mercantile business is not entitled to select from the partnership goods levied on by virtue of an execution against him, and to have exempted to him any portion of the partnership goods under the exemption laws of this State.

2. A writ of mandamus will not lie to compel a sheriff to cause an appraisement of personal property levied on, to enable the debtor in execution to select such as he desires to claim as exempt, after the property has been sold and delivered by the sheriff.

3. An alternative writ of mandamus requiring a sheriff to cause an appraisement to be made of goods levied on, so that the debtor may select such as may be claimed to be exempt from levy and sale, should show that the debtor is a person entitled to claim the exemption.

Writ of Error to the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

Alva A. Knight for Plaintiff in Error.

Fleming & Daniel for Defendant in Error.

THE CHIEF JUSTICE delivered the opinion of the court.

The petition of Peck for a writ of mandamus shows that Bowden, sheriff, by virtue of an execution against the property of Peck, levied upon the interest of Peck in certain goods in the store of J. S. Driggs & Co. belonging to the firm, in which firm Peck was a partner. After the levy and before sale, Peck notified the sheriff that he claimed the benefit of the exemptions laws, and required him to make an inventory of all Peck's personal property, and appoint appraisers; and that he should claim the right of selecting his exempt property after appraisement.

The sheriff made the inventory, and Peck made and delivered an affidavit that the inventory contained a true statement of the whole of his personal property employed in the business of said firm; that he has also a few articles of personal property, which he is ready to point out.

The sheriff refused to take further steps enabling Peck to select the property claimed to be exempt, and on the 4th of August, 1879, after the foregoing action, the sheriff sold under said execution all the interest of Peck in the property and effects of the firm of J. S. Driggs & Co.

Petitioner thereupon prays a writ of mandamus requiring the sheriff to show cause why he should not set aside to petitioner the amount of personal property allowed by law, &c.

A paper treated as an alternative writ of mandamus was issued by the Circuit Judge on the 6th day of August, 1879, and served on the sheriff.

The sheriff moved to quash the writ upon the following grounds:

1. That the petitioner cannot claim exemption of partnership property.

2. That he cannot claim exemption of personal property after it has been sold by the sheriff.

3. That said writ is otherwise defective and bad in substance and in fact.

The motion to quash was sustained, and the relator brings error.

There can be no question that after the sale of property by the sheriff it is too late to proceed by mandamus to compel him to take measures to set aside as exempt from sale the property he has already sold. From the statement in the petetion and writ, it must be assumed that the sale was completed, and the property sold had passed beyond his control. It is impossible that the sheriff can, after such sale, further intermeddle with the property. A writ of mandamus is doubtless a proper mode of proceeding against a sheriff to compel him to appoint appraisers and to do other acts to enable the debtor to make a selection of property claimed to be exempt from sale, but this process should be resorted to while the sheriff has the custody of the goods. It is just as much impossible for the sheriff to proceed with the appraisement one day after the sale as it is one month or one year after. Not only the duty of the officer, but the legal and physical possibility to perform it at the time of the service of the writ of mandamus must exist, else the writ must be denied and the aggrieved party remitted to the ordinary remedies for the wrong, if any is committed. (For the general principle, see High on Ex. Rem., Sec. 14, and authorities cited.)

The question whether an exemption from levy and sale can be claimed in respect to partnership assets levied on for the debt of one of the partners was submitted by the respective counsel, and we have examined it with some care. Though not absolutely necessary to the disposition of the case, it is proper to state the conclusions of the court.

Thompson on Homesteads and Exemptions contains (sections 194 to 216) a very full collection of the authorities

upon the question; and though the author concludes that the rule ought to be that partners may severally claim an exemption out of their interests in the partnership effects to the extent allowed by law, yet admits and shows by his citations that "the courts have, by a very decided weight of authority, settled the doctrine that those statutes do not contemplate the setting apart of exempt property out of partnership assets." See also State vs. Spencer, 64 Mo., 355; 27 Am. Rep., 24 and note.

We think the rule thus "settled" is the sound one. In the nature of partnerships, the property of the firm is not the individual property of either of the members. Neither of them can of right use the property for the payment of his individual debts. The property of the firm is, in the first instance, assets for the satisfaction of the debts of the concern; and, secondly, for the reimbursement of such members of it as are in advance of his proper share of the capital and debts. Until the share of each member is ascertained and severed, the assets are not the separate property of either, but the joint property of all, subject to the above conditions.

If either partner dies, the partnership property survives to and vests in the survivor, not as his individual property absolutely, but to be applied to the liquidation of the liabilities of the copartnership to its creditors, and to reimburse advances by its members before distribution among them all, in proportion to their several equities. Suppose, in the case of this firm, the sheriff had appraised the property of Driggs & Co., and had allowed Peck to select to the amount of one thousand dollars value in the specific goods of the firm and then released these goods from levy. In this case, if Mr. Peck had died the next day, the legal title and right of possession of the goods so claimed and admitted to be exempt would have vested in Driggs for the

purpose of liquidating the debts and winding up of the affairs of the firm. When this is accomplished, if anything remains of the property or proceeds, it would be subject to distribution among the members according to their several interests, (including the representatives of the deceased member.)

We think this illustrates the impracticability of applying the claim of exemption to the property belonging to copartnership firms. The constitutional and the statutory provisions on the subject of exemptions contemplate that the debtor may claim an exemption out of his own property. Partnership assets are not the property of either of the partners. Its possession and ownership for partnership purposes, not for private purposes, go to the survivor if one of them dies, and must be applied to the payment of copartnership debts and for distribution, as before stated.

Property exempted from levy and sale must be selected so as to be identified and set apart. Partnership effects of a mercantile firm are constantly changing in respect to identity, and as one partner cannot take possession of the goods and convert them to his own use against the consent of his copartners, but the goods remain partnership property until sold, a "selection" of such goods by one partner as his exempt property would be a fruitless and idle ceremony, the same goods still remaining the property of the firm for partnership purposes.

In respect to this particular writ of mandamus, it is observed that the relator does not describe or show himself to be "the head of a family residing in this State." This is a fact necessary to be shown to entitle the party to the exemption, and to the aid of the courts to enforce it.

For each of these reasons the appellant is not entitled to the writ, and the judgment must be affirmed.

HARRY AND HENRY WEISKOPH, PLAINTIFFS IN ERROR, VS. ABBY J. DIBBLE, DEFENDANT IN ERROR.

1. Under the statute the writ of error in a civil case, when the defend ant in the Circuit Court applies therefor, issues on demand as a matter of right. No bond is required in such case unless a super-sedeas is desired.

2. A *scire facias ad audiendum errores* is "process" within the meaning of the Constitution of this State. The "style" of process the Constitution provides shall be, "The State of Florida." This is a formal requirement, and if omitted may be corrected by amend-ment under our statute of amendment.

Writ of Error to the Circuit Court of Duval county.

The facts of the case are stated in the opinion.

A. A. Knight and *M. C. Jordan* for the motion.

Cockrell & Walker, contra.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a motion to dismiss this writ of error. Among the grounds urged in support of the motion is that there is no bond for costs given by the plaintiffs in error. The plaintiffs in error here were the defendants in the court below. At common law the defendant, upon a judgment being rendered against him in a civil case, was entitled to a writ of error as matter of right, and it operated as a supersedeas without bond. 2 Bac. Abridg't, Error B.

Under our statute the writ of error issues on demand as a matter of right, and no bond is required when the defendant in the Circuit Court sues out the writ, unless he wishes it to operate as a supersedeas. Then a bond is required. Thomp. Dig., 447, Sec. 4. A want of a bond is, therefore, no ground for dismissal of the writ.

Another ground urged as cause for granting the motion

is that the writ of error does not run and is not issued in the name of the State of Florida. Upon inspection of the record, we find that in fact the writ of error is issued in the name of the State of Florida. There is, therefore, nothing in this ground of the motion.

The last ground is that the *scire facias ad audiendum errores* is not issued in the name of the State of Florida. The record discloses that this is the fact, and the question arises whether the writ of error for this reason should be dismissed. The Constitution, Section 2, Article 6, provides that the style of all process shall be, "The State of Florida." Proceedings in error are the prosecution of a new suit or action, and questions as to the sufficiency of process arising in them are controlled to a great extent by the same rules as control in original actions. The citation in a writ of error performs the function of a summons *ad respondendum* in an ordinary action. The style of process is its title, and the title of process in civil cases has been the subject of amendment from a very early period in English history, (8 Co., 158; 1 Com., 579,) commencing with the statute of 14 Ed. III., Chap. 6, and embracing the various statutes of amendment mentioned in Thompson's Compilation of British Statutes in force in this State. (Thomp. Comp., pp. 13 to 40.) It may be conceived that this *formal* requirement being in the Constitution is more binding upon the judiciary than if in an ordinary statute. Such, however, is not the case. We are as much bound by the one as the other, if the statute is within the powers of the Legislative Department of the government. It is equally the subject of amendment in one case as in the other. 2 Pick., 594; 32 N. H., 88; 15 N. H., 37; 7 Ark., 536; 15 Fla., 423. As covering the precise point here, see 10 Wis., 100; 35 Mo., 196.

Motion denied.

HARRY AND HENRY WEISKOPH, PLAINTIFFS IN ERROR, VS. ABBY J. DIBBLE, DEFENDANT IN ERROR.

1. In an action of ejectment by a widow seeking to recover dower assigned to her, the letters of administration are not evidence in her individual suit against a stranger to prove the death of the husband.
2. In actions of ejectment, special pleas of the statute of limitations should not be allowed and such pleas should be struck out by the court without motion.
3. Adverse possession may be shown under the plea of not guilty. (See Wade v. Doyle, 17 Fla., 522, and authorities cited.)

Writ of Error to the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

Cockrell & Walker for Plaintiffs in Error.

A. A. Knight and *M. C. Jordan* for Defendant in Error.

THE CHIEF-JUSTICE delivered the opinion of the court.

Abby J. Dibble, defendant in error, brought an action of ejectment against plaintiffs in error to recover a portion of a city lot in Jacksonville and mesne profits, claiming title to the lot. Defendants in the suit pleaded not guilty, and that plaintiff was not the owner or entitled to the possession. They pleaded further that neither the plaintiff nor her ancestor, predecessor or grantor, was seized or possessed of the premises in question within seven years before the commencement of this action. They further pleaded that they and their predecessors and grantors entered into possession under claim of title exclusive of any other right, founding such claim upon a written instrument, to wit: a deed of conveyance by C. H. Dibble dated in 1856, and that they have been in continued occupation under said claim for

seven years and upwards before the commencement of this action, and that they have been so in possession and protecting the same by a substantial enclosure.

For further plea they say they and their grantors entered into possession, and have held possession adversely to the plaintiff more than seventeen years before the commencement of this action.

The plaintiff joined issue upon all the pleas. The suit was commenced in May, 1878.

Upon the trial, plaintiff introduced in evidence a deed executed in 1853 by I. D. Hart to Charles H. Dibble, including the lot in controversy; a deed to Dibble by H. H. Hoeg, executed in 1856; letters of administration upon the estate of Charles H. Dibble, deceased, granted to John Coniff March 12, 1877; a copy of proceedings in the Circuit Court upon petition of the plaintiff, Abby J. Dibble, as the widow of Charles H. Dibble, claiming dower in the lot, whereby commissioners set off to plaintiff the land in question as her dower, and the report of said commissioners was confirmed by the Judge. Plaintiff also proved her marriage with Charles H. Dibble in September, 1853, and it was admitted in writing on the trial that defendants, Weiskophs, and their grantor, H. H. Hoeg, had occupied and possessed the premises in question since April 13, 1856, and defendants are now in possession, and that plaintiff, Abby J. Dibble, had not been in possession of the premises since that date.

The trial was had May 27, 1879, and a verdict rendered for plaintiff, upon which judgment was entered for the recovery of the lot and for damages and costs.

A motion for a new trial was made and denied, and the defendants bring error.

The Judge, among other things, charged the jury that "if the plaintiff has proved her husband's death, and the

letters of administration are *prima facie* evidence of that fact, it is incumbent upon the defendants to show under the plea of limitation that he died seven years prior to the commencement of this suit."

This was excepted to by defendants' counsel, and this charge is assigned as error.

The plaintiffs in error also assign for error that the court refused to charge the jury as requested by them, to which they excepted, and also that a new trial was refused on their motion.

The instructions tendered by the defendants and refused by the court refer to the question of adverse possession as a bar of the right to recover.

As the judgment must be reversed because of the error alleged in the portion of the charge excepted to, and because it is evident from the facts developed upon the motion for a new trial that the case, when tried again, will present other phases of the questions of dower and limitation, we shall abstain from entering into an examination of these questions upon the facts now before the court. The fact that the questions of adverse possession as a defense to the suit to recover dower, and of the time when the statute of limitations should begin to run against the plaintiff, have been but partially presented, and that a more full examination of these questions is desired, is also a valid reason for postponing their consideration.

The portion of the charge excepted to, as before quoted, declares that in this suit "the letters of administration are *prima facie* evidence" of the death of the husband of the plaintiff.

Plaintiffs in error insist that this charge assumes that the letters of administration are *prima facie* evidence of the fact that plaintiff was the wife of Charles H. Dibble who was seized of the land during coverture, and that he is

dead. Other portions of the charge, however, are to the effect that they must find from the evidence that the plaintiff was the wife of Dibble, and that he was the owner during coverture. The material error is that the letters of administration constitute *prima facie* evidence of the death.

There is some, but not very great, conflict of authority upon this point. The dictum of Mr. Greenleaf (1 Ev., §550) is that, *in general,* the letters are evidence of the death. He cites Thompson vs. Donaldson, 3 Esp., 63 which was a suit on a policy of insurance, and Lord Kenyon held that the production of the letters of administration was not sufficient evidence of the death. In French vs. French, 1 Dick., 268, Lord Hardwicke, under special circumstances, admitted the probate of a will to be read as proof of the death of the testator. The law in England is held by the courts to be that the letters are not, *per se,* evidence of the death. In this country it is generally held that the letters may be received as evidence of the death of the testator or intestate, in cases where the executor or administrator is a party defendant and sometimes where he is the plaintiff.

It is said by defendant in error that the granting of letters is evidence of an adjudication by a court of competent jurisdiction that the person named therein is dead. As between parties represented before the Probate Court this is true, but there is another general rule of ancient date, and strengthened by its age, that no person is bound by a judgment to which he was not a party or privy. The proceeding on the probate of a will, or on application for letters of administration, is *ex parte* as to all except those directly interested in the estate, and having actual or constructive notice.

But it is not necessary to enter into a full discussion of the question. The Supreme Court of the United States has

settled the question to our satisfaction. Counsel for defendant in error says that the reasoning of that court in the Mutual Benefit Life Insurance Company vs. Tisdale, 1 Otto, 238, is "fallacious;" but we think the deliberate, unanimous judgment of the highest court in the land is entitled to more respect from us. In that case, after a careful review of the question, and of the cases decided in this country and in England, and in giving numerous pointed illustrations of the rule, the court concluded its opinion as follows: "Enough has been said to demonstrate that neither upon principle nor authority was it proper, in the individual suit of Mrs. Tisdale against a stranger, to admit letters of administration upon the estate of her husband as evidence of his death." And see English vs. Murray, 13 Texas, 366.

In conclusion, we cannot forbear calling attention to the judgment of this court in Wade vs. Doyle, 17 Fla., 522, where it is held that under a plea of not guilty in ejectment, evidence to prove an adverse possession is admissible, and a special plea of the statute of limitations should not be allowed. Such a plea, when filed with the general issue, should be struck out on motion, or *sua sponte*, by the court, as tending to embarrass the trial.

The judgment in this case is reversed and a new trial granted.

WM. L. SEYMOUR AND WM. R. SIMPSON, APPELLANTS, VS. CRESWELL ET ALS., COMMISSIONERS OF THE FREEDMEN'S SAVING AND TRUST COMPANY, APPELLEES.

1. A bill of exceptions should contain only so much of the testimony as is necessary to decide the questions raised by the exceptions. Where, upon the face of the bill, it appears that a mortgage and a record which was in evidence was omitted, this court will give every benefit to the respondents which could reasonably attend such papers: but if it appears from testimony in the record, (the authenticity of which cannot be doubted,) that there is error, this court will correct it.

2. Where the initial point of a survey is the bank of a river at a named point, a plaintiff in ejectment, claiming that the land has extended into the water beyond the original initial point named in his deed, thus changing his boundary by leaving out lands lying beyond the lines extended from the initial point, must prove the fact of encroachment of the land upon the water.

3. To constitute an adverse possession as against the true owner, where a party under a mistake as to the boundaries of his deed claims land not embraced therein, there must be an actual possession and improvement of the land which lies outside of his boundaries. This under the statutes anterior to the act of 1872.

4. As against the true owner, a plaintiff in ejectment, claiming title founded upon a written instrument and a judgment or decree of a court, to be deemed in adverse possession, must, under the statute of 1872, (chap. 1869, laws,) have usually cultivated or improved it, or have protected it by a substantial enclosure, or, if not enclosed, have used it for the supply of fuel, or of fencing timber for the purposes of husbandry, or for the ordinary use of the occupant.

5. The general rule in actions of ejectment that the claimant must recover upon the strength of his own title, does not operate to prohibit the acquisition of possessory rights which may be enforced in ejectment between parties in cases where the true owner does not intervene; but a prior possession to be effective as against a mere squatter or intruder in actual possession, must be an actual, unabandoned possession. The payment of taxes, surveying and mapping the lands, and executing a mortgage covering them, do not constitute such possession.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

J. C. Marcey and *C. L. Robinson* for Appellants.

Cockrell & Walker and *Judson W. Whitney,* for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

A preliminary question is raised by the respondents as to the bill of exceptions in this case. The bill shows upon its face that the decree of foreclosure of the mortgage given by O. B. Hart to Cone, and the record in the suit of Howell and wife vs. Simpson, were used in evidence, and neither of these papers is in the record. Respondents contend that for this reason, and because the bill of exceptions does not purport by its recitals to contain the whole of the evidence, this court must presume that there was proper evidence to support the judgment, and it must be affirmed. As a matter of fact, the bill by its recital does purport to contain all of the evidence of each of the parties, and we must hold these recitals to be correct, except where, upon the face of bill, the contrary appears. The commencement of the bill follows the form prescribed by the rules of practice controlling the subject, and the recitals as to the testimony of each of the parties is in the form which implies that all of the testimony is in the bill. Immediately preceding the charge of the Judge, the bill recites that "the parties had submitted and concluded all their testimony and the several matters aforesaid." The bill also recites that "the plaintiffs submitted all their evidence as above herein set forth, and did then and there rest." This is entirely sufficient, according to the form prescribed by this court, and the forms followed under the English practice. Rules of Prac. Circuit

Courts. pp. 37. 38; Tidd's Forms, 329; 2 Steph. Nisi Prius by Sharswood, 1797.

Again, it is not necessary that a bill of exceptions should in all cases contain all of the evidence. In a large majority of cases it should not. It should contain only so much of the evidence as is necessary to present the legal questions raised. When more than this is inserted in the bill it is an irregularity, to be condemned as a departure from established practice, inconvenient and embarrassing to the court. 1 Black, 209; 6 Fla., 522. The omission of the decree of foreclosure of the mortgage of O. B. Hart to Cone will not authorize us to presume independent facts relating to title and possessions having no connection with such mortgage. In the treatment of this case we examine it upon the hypothesis that such mortgage was, in all respects, regular and proper, and that it authorized the decree of sale, and the sale had thereunder. So in reference to the record in the suit of Harrell and wife vs. Simpson to the extent that any matter in the record could be affected by it, we must and will make every presumption in favor of the respondents. This matter is not material in the decision of this cause. It concerns the questions raised as to parties plaintiff, and our decision is upon other grounds independent of any question which this record could affect. The deeds constituting the chain of title of each party are before us, and all the evidence bearing upon the question of possessions is in the bill. It is from these facts that our conclusion is reached. We must say, however, that we can see no excuse in this record for the negligence shown by the omission from the bill of the papers referred to. Thus disposing of the questions made in reference to the bill of exceptions, we reach the case as it is presented by the record.

The appellants in possession are sued in ejectment by the respondents to recover lots six and seven in block one hun-

dred and thirty-six, in the City of Jacksonville, with mesne profits, for their use and occupation. After trial, verdict and judgment for respondents, this appeal is prosecuted, and the case is here upon exceptions taken during the trial and to an order of the court overruling a motion for a new trial made by the appellants, against whom the verdict was found by the jury; the ground of the motion being that the verdict was contrary to the evidence.

The case is interesting, presenting as it does, some very nice questions concerning the doctrine of title through adverse possession, and rights resulting from possessions without title.

A general principle controlling in actions of ejectment is that the plaintiff must recover upon the strength of his own title, and not on the defects in that of his adversary. We first enquire whether, in view of this general rule, the respondents established by their evidence such a title to the premises. They insist that they did.

In treating this question we do not propose to make elaborate citations from the testimony, but to state our conclusions from repeated careful examinations of it.

The plaintiffs in the Circuit Court (respondents here) propose to trace their title to the heirs of Purnal Taylor, the claim being that under a deed from such heirs to Isaiah D. Hart, dated May 6, A. D. 1834, and a deed of Maria Hogans, dated the third day of December, A. D. 1851, the title to these lots passed to I. D. Hart, and that through regular conveyances from Isaiah D. Hart and other parties claiming through him, his and their rights were vested in them.

The land conveyed to I. D. Hart by the heirs of Purnal Taylor is indicated by sections, townships and named boundaries in chains, being described generally as "part of a tract of land granted by the Spanish Government to the

widow and heirs of Purnal Taylor, deceased, on the 13th of September, A. D. 1816, and surveyed by George I. F. Clark, Surveyor General, on the 21st day of February, A. D. 1817." From the evidence in the record, whether we disregard or consider the opinion of the Commissioner of the General Land Office of the United States as to the boundaries of the Hogan grant, which is objected to as not being admissible as evidence, the jury could have concluded, as we think they did, that the land described in the deed of the heirs of Purnal Taylor to I. D. Hart was embraced in this grant by the Spanish Government. This grant, which is called in the testimony the Hogan's grant, was confirmed by the Board of Commissioners for ascertaining claims and titles to land in East Florida on the 26th of April, A. D. 1824, to Z. Hogans and his heirs, (4 American State Papers, 171,) and was subsequently confirmed to Hogans by act of Congress of February 8th, 1827. 4 Stat. at Large, 202.

One of the witnesses for plaintiffs (R. N. Ellis), who had surveyed the grant, testified that it included the lots which are the subject of this controversy. Charles F. Smith, a witness for defendants, who was likewise a surveyor, testified that he had run the lines of the Hogan's grant, and that they did not embrace these lots. The jury believed the survey by Ellis to be correct and so found. It was a question of credibility, and we must adopt their conclusion. This, however, only establishes the right and title of the grantors of Isaiah D. Hart to these lots at the date of their conveyance to him in 1834. It does not establish any title in I. D. Hart, because the grant to him was of a *"part"* of the Hogan's grant. His title and his right, so far as they result from his deed, must be fixed by the boundaries of that deed. All the witnesses who testify as to the boundaries named in this deed swear that they do not embrace lots six and seven in block one hundred and thirty-six, the

land which is the subject of this suit. Plaintiff's attorney, in explanation of this testimony, urges that "none of the witnesses pretend to say what changes had in forty-six years taken place in the banks of the river, or whether the present bank of the river is where the bank was, while we are all acquainted with the natural process of accretion and rescision constantly going on in rivers." The bank of this river is the initial point of the surveys made of the boundaries named in the deed of the heirs of Purnal Taylor to Isaiah D. Hart. If there has been sufficient accretion, it may be true that the north boundary as named in the deed would fall south of these lots at the time of the surveys by these witnesses, while at the date of the deed it may have embraced them, but there is in the record no evidence of either accretion or abrasion, and we are unable to see how, in the absence of any testimony upon the subject, we or the jury can say there was an addition to the bank rather than an abrasion of it. The burden was upon the plaintiffs to show that these lots were embraced within the boundaries named in this deed, and if the bank has encroached upon the water of the river to such an extent as to produce the result stated, the plaintiffs should have established it by testimony. This they have failed to do, and the necessary result is that there is not a particle of foundation in this record for the view that the land described in this deed embraced these lots. The result is that I. D. Hart never had the legal title to these lots by virtue of this deed, and not having the legal title there could be no legal seizin or possession incident to title in him, and he having no legal seizin or possession by title, the plaintiffs could not derive them from him. The deed from Maria Hogans does not purport to convey a title beyond her interest. The record discloses that she did not own the entire property but only a limited estate in it, and her deed can be no foundation

for a judgment awarding the entire property to the respondents. From what has been said it is clear that I. D. Hart had no paper title to the property.

The next question to be considered is, did any right accrue to him by virtue of any possession established by the evidence. For if such right did accrue, it vested in the plaintiffs by virtue of the several conveyances through which they claim, reaching as they do the estate of I. D. Hart in the premises.

The only testimony bearing upon the matter of the possession of this property anterior to the claim made to it by the grantees of the executors of the will of I. D. Hart, is that of C. L. Robinson who swears that for seventeen years before 1874 the lands were unoccupied and covered with brush and scrub.

There is no testimony showing that I. D. Hart even claimed the property under this deed. True it is that his executors sold it as a part of the estate, but it certainly cannot be seriously contended that this fact alone establishes any possession by I. D. Hart. But, however this may be, it is certainly true that the testimony does not show any actual cultivation or possession of these lots by I. D. Hart, and even admitting that he did simply claim the land, this would not be sufficient to give him a possessory right as against either the true owner or a mere squatter or intruder. Admitting that I. D. Hart claimed the land, no right vested in him, and if he took possession it was a possession of land outside of the boundaries of his deed taken under a mistake as to their extent. The rule as to such possession, when considered with reference to the right of the true owner, is that where a grantee in taking possession under his deed goes unintentionally and by mistake beyond his proper boundaries, and enters upon and actually occupies and improves land not included in the deed, claiming

and supposing it to be his, this occupation is to be deemed adverse within the meaning of the statute of limitations, (reference is here made to the statutes in force anterior to the act of 1872, Chap. 1689, Laws.) and if continued the requisite length of time will bar the right of the true owner. 22 Penn., 139: 7 N. H., 457: 10 ib., 397: 1 A K. Mar., 460: 5 Litt., 210: 6 B. Mon., 463: 22 N. Y., 170. There certainly was no such adverse possession as this in this case. In fact there is no evidence of any possession or even of any claim to these lots by I. D. Hart. Our conclusion, therefore, is that the evidence does not establish a prior possession in I. D. Hart of such character as would have been good even as against a mere squatter or intruder.

The next deed in the chain of tite of plaintiffs is a deed of the executors of the will of I. D. Hart to O. B. Hart, dated the first day of June, A. D. 1866. This deed embraces the lots in question. The evidence as to possession under this deed is as follows:

J. C. Greeley, for plaintiff, says that he lived in Jacksonville in 1874, and knows the location of lots six and seven. The lots were unoccupied—not in the possession of any one except as other vacant lots. They were not fenced or cultivated, and that defendant entered into possession since A. D. 1874; that O. B. Hart mortgaged the land and claimed title; that he paid taxes to witness, who was Collector of Revenue at that time; that in January, 1875, a fence was put around the lots by defendant Simpson.

F. F. L'Engle, for plaintiff, says that Hart employed him to survey the lots in the spring of 1866, pointing out these lots as the property of the estate of I. D. Hart, and that he made a map for Hart from which sales were made.

William Caulk, for plaintiff, says: That the heirs of O. B. Hart claimed these lands; that no one was in possession

on November 2d, 1874, and that there was a part of a fence in 1866 put up by the government.

Defendants' witnesses, as to the matter of possession, testify substantially as follows; Charles F. Smith says that there was a fence in 1866 enclosing a small part of lot 6; that it enclosed a government burial ground; that no one was in possession in 1865; that lots six and seven were not cultivated until after 1875, and that in 1870 there was no fence.

Simpson, for defendants, testifies that he has had control of the lots for over three years; that there was a fence around lots six and seven when he went to reside on lot 5, which is a lot adjoining lot six; that he repaired the fence he found there, and that it is still there. This trial was had November 2d, 1879, which would place him in control of the lots before November 2d, 1876.

C. L. Robinson, for defendants, swears that Simpson has been possession of lots six and seven for nearly four years; that witness put the fence around these lots in 1874, and that they had not been fenced before; that they were cultivated by a tenant of his for the first time in 1875, and have been cultivated ever since that time.

The next deed in the chain of title of plaintiffs is the deed of a Master in Chancery who sold the interest of O. B. Hart to the plaintiffs. The sale was under a decree of foreclosure of mortgage, given by O. B. Hart to Cone. This deed of Durkee, the Master, is dated November 2d, 1874. We have thus presented the entire case of plaintiffs. We have seen that there was no title or adverse possession in I. D. Hart which he could transmit to O. B. Hart; that O. B. Hart claimed under color of title through a sale of I. D. Hart's interest under an order of court, and that plaintiffs claim through a sale of O. B. Hart's interest under an order of court; O. B. Hart paid taxes on the lots, executed a mort-

gage thereon, mapped them as his land, and, without any actual occupation, cultivation or enclosure, claimed them as vacant, unoccupied lots. We find no evidence of any act of ownership by the plaintiffs. They purchased November 2d, 1874, and Robinson, defendants' grantor, went into actual possession in 1874 or 5.

Robinson's grantor, Smith, who was a witness, states that he assumed ownership at the time of getting the deed; that by virtue of his deed he claimed lots six and seven, and sold them to Robinson in 1874. His deed to Robinson bears date January 10th, 1874. While Smith alludes in his testimony to his deed, he does not produce it, nor does he show any act of ownership or possession. It is not proved that he was even a squatter, or that he occupied any other relation to the land than simply to claim it. Not producing his deed, we must regard him as a mere claimant of vacant, unoccupied lands.

Thus stating the title and the evidence as to possession, the question is, did the plaintiffs make out a case giving them a right to a recovery? They certainly made out no title by virtue of any adverse possession as against the true owner. Their title was founded upon a written instrument and orders and decrees of courts authorizing sales of the land. From the first day of June, A. D. 1866, the date of the Master's deed to O. B. Hart, to 1874 or 5, when the persons through whom defendants claim took possesion, gives us seven or eight years; but there is in the record no evidence of any actual cultivation or improvement of the lots by O. B. Hart or the plaintiffs, or of protection by a substantial enclosure, or if not enclosed, of use for the supply of fuel, or of fencing timber for the purpose of husbandry, or for the ordinary use of the occupant, or of any partial improvement. In the absence of any act of this character, there is, under the circumstances of this case,

covered as it is by section 6 of the statute of limitations, [Chapter 1869,] no adverse possession by O. B. Hart or the plaintiffs as against the true owner.

While this is true when the nature of an adverse possession as against the true owner is considered, it is still to be remarked that the general rule in actions of ejectment hereinbefore stated to the effect that the claimant must recover upon the strength of his own title, does not operate to deny or prohibit the acquisition of rights through prior possessions without good title. It is unquestionably true, as a legal proposition, that when the owner of the true title is quiet as to possession of parties, the law in some cases gives the first occupant and his grantees in possession a right to eject a subsequent possessor or his grantees. Nor do we see that the law of possessions, as thus stated, conflicts with the general rule that the plaintiffs must recover upon the strength of their own title if the matter is examined with strict, careful analysis, for the plaintiff who recovers by virtue of a proper prior possession recovers as much upon the strength of his own title as if he shows a good deed to the premises. The doctrine of title by adverse possession certainly embraces title without a deed in all respects conforming to legal requirements as to deeds unaccompanied by adverse possession. So a person who enters as tenant to one in possession without title cannot put his landlord to its proof. Prior possession or occupancy gave rights not only to the use but to the substance of the soil before there were any regulations by legislation of the method of transferring rights of this character by one person to another. At common law estates of freehold in lands passed by livery of seizin only, that is by delivery of actual possession. There is authority for this view, both sacred and profane. Even under the law prevailing in the land of the Philistines at the time Abraham was a sojourner therein, rights result-

ing from prior possession were claimed and enforced, for we find that Abraham, after digging a well and being violently dispossessed thereof by the servants of Abimelech, was restored to his possession and his right enforced. (Moses Reports, Book Genesis, chap. 21, v. 23 to 31.) Blackstone in his philosophical essay upon the natural right to soil by virtue of prior occupation, and the recognition of this right under the common law, says that "occupancy gave the right to the temporary use of the soil, and also the original right to the permanent property in the substance of the soil itself."

The rule as to rights resulting from prior possession we think is correctly stated by the Court of Appeals of Virginia, when it holds that where a party in peaceable possession of land is entered upon and ousted by one not having title to or authority to enter upon the land, the party ousted may recover in ejectment upon his possession only; and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under the title. 11 Gratt., 174. In the English cases of Read and Morpeth vs. Erington, Croke E., 1, iz., 321; Bateman vs. Allen, ib., 437; and Allen vs. Rivington, 2 Saund., 111, it was shown that the plaintiff was in possession, and that the defendant entered without title or authority, and the court held that it was not necessary to decide upon the title of the plaintiff and gave judgment for him. See also 14 Eng. Common Law, 41.

This doctrine seems to be questioned in some of the States of the Union, among which are Delaware, North Carolina, South Carolina and Indiana, but the decisions in Virginia, Georgia, Kentucky, California, New Jersey, Connecticut, Vermont, Ohio, Pennsylvania, Maryland and Texas sustain it, and we think the rule eminently calculated to preserve

peace in communities where there are vacant lands of which parties may take possession. For if the last possessor, even if by violence, is to be sustained, there certainly would be personal conflict. The possession which the law contemplates, in a case where plaintiff has no title, however, in an actual possession. Some of the authorities say "an open, notorious, exclusive and actual possession." In this case neither O. B. Hart, nor the plaintiffs who derive through him, had such actual possession." O. B. Hart paid taxes, had the land surveyed and mapped, and executed a mortgage thereon, but this is not the possession which gives the plaintiff in ejectment without paper title a right to recover. 6 Ohio, 165; 3 Har. & McHen., 621; 4 Dana, 463; 18 Ohio, 323; 5 Litt., 320. A plaintiff in ejectment without title cannot recover as against a mere intruder without title, if such plaintiff has not himself had a prior actual possession of the land. The defendants here claim, apparently, through a mere squatter without title, and the conveyances which constitute their chain of title are quit claim deeds. We deem it unnecessary to define the defendant's status here further than to say that his right is not less than that of a mere squatter, and hence that the plaintiffs under the law and the testimony in this case, as we have stated them, should not have recovered judgment. There should have been a new trial granted.

Judgment reversed and new trial awarded.

The appellee filed a petition for a rehearing, arguing as follows:

That the court in deciding that there was no evidence in the court below to sustain the verdict of the jury overlooked (owing, perhaps, to the failure of Mr. Walker, the counsel who argued for appellees, to call attention to it,) the omission from the transcript of the two maps of the

City of Jacksonville, which were introduced in the court below by the appellants.

Petitioners' counsel was of the impression that these maps had been sent up on application of appellants, and complained in his written argument of the action of appellant's counsel in that respect.

The bill of exceptions distinctly states that these maps were introduced in evidence. They are not, however, incorporated in, annexed to, or in any way made part of the bill; wherefore we submit that they were not before the Supreme Court, and that the court ought to presume upon familiar rules that this evidence, which was before the jury, was sufficient to show that the lots in controversy are embraced in the deed from Taylor's heirs to I. D. Hart. 23 Ala., 714; 30 Ala., 244.

But these maps did, in truth, in connection with the other evidence in the cause, establish the title of petitioners. At all events the jury so found, and the Judge, who had *all the evidence* before him, refused to disturb the verdict.

If the maps are in the Supreme Court, an examiniation of them will, we think, make this plain. If they are not before the court, then, if upon any reference that can reasonably be indulged as to what they would show the judgment can be sustained, it, we respectfully submit, should be.

Assuming that the court can consider these maps, we crave the leave of the court to brief the evidence in this connection. The deed from John Warren to Isaiah D. Hart, *25 Oct., 1829*. The tract therein conveyed is what is known as *"Hogan's donation,"* as appears by the references in the deed to the sources of the title and the Am. State Papers. The *south boundary* called for in the deed is "lands *belonging to Lewis Z. Hogans* and John L. Doggett;" that is *"the Hogans' grant."*

The *26th May, 1834, Lewis Z. Hogans* and others, the

heirs of Purnall Taylor, conveyed to Isaiah D. Hart *part* of "the Hogans' grant;" or, in other words, part of "the land belonging to Lewis Z. Hogans," which, by the deed of Warren in *1829*, was made the southern boundary of the lands therein conveyed.

Each of these grantors then understood that the northern and southern boundaries, respectively, of these two tracts were coincident. Ellis, the surveyor, testified that the southern boundary of the one is the northern boundary of the other, calling the one tract Hogan's Donation, and the other Hogan's Grant, and the jury so found. And we presume there can be no doubt that, upon the whole testimony, the jury were justified, or, at any rate, were not without support by evidence in finding that I. D. Hart, by virtue of two deeds, acquired a strip of land, being part of the Hogan's grant, having for its northern boundary the southern boundary line of Hogan's donation, and that the vacant lands not embraced in either the Hogan's donation or the Hogan's grant, (being the 15 acres of which the witness Smith "assumed ownership,") existed only in his fancy, fertilized only by the ingenuity of avarice.

The testimony of Ellis shows, according to the verdict of the jury, indeed there is no dispute as to that, that Market street of the City of Jacksonville, from the eastern boundary of the Hogan's grant, or, as he expresses it, the dividing line between the *Hogan's tract* and the Masters or *Doggett's tract*, the deed from *Lewis Z. Hogans and Taylor's heirs* to Hart, bounds the land thereby conveyed on *the east* by lands *claimed by Doggett.*

So the jury having thus found the eastern boundary, and the southern boundary being the St. Johns river, they were also justified in finding the northern boundary to be the south line or boundary of the land conveyed by Warren to Hart, (the Hogan's donation); notwithstanding the lines

when run, according to the courses and distances called for in the deed, would not reach up to this northern boundary. "The certainty of metes and bounds will include and pass "all the lands within them, though they vary from the "given quantity expressed in the deed," and "the least cer- "tain and material parts of the description must yield to "those which are the most certain and material, if they "cannot be reconciled." 4 Kent's Com., 466. Now, the southern, eastern and northern boundary of the "*part*" of the "Hogan's grant" conveyed by Hogan's and Taylor's heirs, having been thus fixed by the jury, it only remains to be seen whether there was evidence tending to show that the western boundary of this part of the "grant" takes in block 136. We say this only remains to be done, because the witness Ellis says that Hogan's grant does embrace block 136, and the evidence generally sustains him. It appears, we submit, from the above review of the evidence, that we have got, by our deed, a strip running *the entire length from north to south* of this grant. So if our western boundary is far enough west, then our deed comprises, necessarily, this block. But having reached this northern boundary by running to the south line of the land previously conveyed to us by Warren (the donation), the deed calls for the next line wholly by course and distance. The western boundary is "lands of the parties of the first part," and the location of this western boundary can *only be ascertained* by running from the east boundary of the part conveyed at the point where it reaches the north boundary, running, we say, 26½ chains, or 1749 feet. Now, it appears from the maps introduced in evidence, and is well known to everybody within the jurisdiction of the court below, that the lots of the City of Jacksonville are of a uniform width of 105 feet, and the streets of 70 feet. It further appears from the maps that from Market street to Laura

street, which in the western boundary of block 136, there are 13 lots of 105 feet each, making 1365, add 3 streets, 70 feet each, 210 feet, and we have 1575 feet; but the line we run is 1749 feet, so that it not only includes block 136, but goes 174 feet further to the west.

We submit that if this evidence, or this review of it, had been presented on the former hearing, the court might not have held that there was no evidence to support the verdict of the jury.

The witness, Ellis, who testified that block 136 *is in Hogan's grant,* and who also testified that it is *not* embraced in the deed to Hart, only meant, as we think is obvious from his testimony, that it is not embraced if the survey must be made according to the courses and distances given without reference to the boundaries called for.

What we have said above is upon the presumption that the maps will be considered by the court, although they are not in the bill of exceptions, or made part thereof by any appropriate reference. If they are not to be considered by the court, then we are entitled to every legitimate inference that the jury might have drawn from them, viewed in the strongest light for us.

And we respectfully ask to be further heard upon the point that where the bill of exceptions *purports* to set out all the evidence, and yet it is apparent that *it does not,* the same presumtions will be indulged in support of the judgment of the court below as would be in a case where the bill *did not purport* to set out all the evidence. It is indeed settled by the Supreme Court that the bill in this case does *purport* to set out all the evidence; but that pretension of the bill is clearly *untrue* in respect of two important pieces of testimony (the Cone decree and the record in the suit of Howell and wife vs. Simpson), referred to by the court, and in respect of other pieces not adverted to in the opinion of

the court, viz: the Am. State Papers and *the maps of the City of Jacksonville and another map mentioned in the testimony of Davis,* and it would seem used in evidence. If there was other testimony not mentioned in the bill, we are not at liberty to say so. We can only refer to such omissions as are made apparent by the bill itself. We have faith, however, that upon a rehearing we would be able to satisfy the court that a bill of exceptions so defective as this cannot support the assignment of error "that the court erred in refusing to grant a new trial;" that the ruling of the court upon a motion for a new trial ought not to be held error unless the party who complains of such ruling brings before the Appellate Court all the evidence—*a fortiori,* when it affirmatively appears that such party does not bring up all the evidence. The Judges of the courts below do not in practice narrowly examine bills presented by counsel when the bill *purports* to set out all the evidence; so when they sign and seal a bill professing to set it all out, but which, when carefully examined in the Appellate Court, is found wanting, their action, as reported by the bill, is entitled to be protected by all fair and reasonable presumptions. One of these presumptions, it seems to us, is that if, manifestly, portions of the evidence, hurtful to the appellants, is omitted, other evidence equally hurtful may have been omitted, though such omission may not be apparent upon the face of the bill.

MR. JUSTICE WESCOTT delivered the following opinion thereon:

An application for rehearing is made in this case. Admitting our liability to err, we examine the matters suggested to correct the error if one is found to exist.

The principal ground urged in the petition is the alleged omission of certain maps and the fourth volume of Ameri-

can State Papers from the bill of exceptions, which maps and State papers were used upon the trial in the Circuit Court.

The maps referred to are mentioned in the bill of exceptions several times, and the original maps are on file in this court, accompanied by an order of the Judge and a certificate of the clerk that shows they were the originals used upon the trial of the cause. They are identified as maps "having thereon the lines and marks and boundaries delineated by the engineers and experts who testified in the cause."

The fact that a copy of so much of the American State Papers as was used in the trial is not embraced in the bill of exceptions, (another suggestion made,) we think immaterial. The bill shows that volume four of such papers was introduced upon the trial. Our attention is drawn to the matters therein which were deemed pertinent to this cause, and it is conformable to our practice here to refer to such matters when thus identified and referred to.

These papers were referred to by both parties, without exception, upon the hearing. They are referred to now in this petition, and certainly an objection of this kind is too late at this time.

In this case the jury evidently found that the north boundary of the land conveyed to I. D. Hart, through whom respondents claimed, was the north boundary of the Hogans' grant. Upon no other reasonable hypothesis could their verdict be sustained. Upon our then careful examination of the testimony, it not only did not sustain this conclusion of the jury, but such view was clearly *contrary* to the testimony. We examined the testimony and found that the north boundary of the land conveyed to Hart by Hogans and others did not embrace the lots in question, and upon this state of facts we announced the law without

expressly deciding what our view would have been if the facts were as contended for by respondents.

Have we made any mistake in this fact? The deed from Hogans and others to Hart, dated May 6, A. D. 1834, conveys "all that certain tract, piece or parcel of land lying and being within the following boundaries: that is to say, bounded on the east by lands now claimed by John L. Doggett, on the north by lands claimed by the said party of the second part, on the west by lands of the parties of the first part, (it being a part of the aforesaid tract,) and on the south by the St. Johns river. The first line begins on the banks of the aforesaid St. Johns river, and runs north forty chains; the second line runs west twenty-six and a half chains, and the fourth line runs east twenty-six and a half chains to the point of beginning, containing one hundred and six acres, more or less. It being part of a tract of land granted by the Spanish Government to the widow and heirs of the said Purnall Taylor, deceased, on the 13th of September, A. D. 1816, and surveyed by Geo. I. F. Clark, Surveyor General, on the 31st day of February, A. D. 1817."

R. N. Ellis, the only witness for the respondent who is examined as to the question whether this deed embraced lots 6 and 7, says:

"This deed does not embrace the land in controversy, to-wit: lots six and seven, in block 136. I have surveyed the land described in said deed, commencing at the foot of Market street, thence north forty chains, thence west 26½ chains, thence south forty chains into the river, thence east to the point of beginning. The survey made by me was from the description in the deed. The north end of the forty chains from the foot of Market street falls in lot five, block 95, as by the old numbers of the blocks. The north line of 26½ chains, running west, is 300 to 400 feet south from lots 6 and 7, in block 136. The north line of the

Hogans' grant, by my survey, runs about seventy feet north of these lots." This witness states also that "the north line of the Hogans' grant and the south line of the Hogans' donation are the same line." According to this testimony it is clear that lots 6 and 7 were embraced in the Hogans's grant; and it is equally plain that the land covered by this deed does not embrace lots 6 and 7. Nor is there any uncertainty as to area. The deed states the land to be conveyed as 106 acres, more or less, and that is the quantity embraced in the boundaries given by courses and distances. Forty chains, or one hundred and sixty rods, is the distance north and south. The distance east and west is 26½ chains, or 106 rods, and this gives us 106 acres. To extend the north and south line 350 feet, would give us one hundred and twenty-eight and one-half acres. There is certainly no principle of law applicable to these facts by which we can embrace in this deed more land in acres than it calls for, and at the same time extend the metes and bounds expressly named. It is apparent from the bill of exceptions that it contains all the testimony given upon it. We see no doubt about the matter. It is not a case of conflict of testimony. As to this matter, the verdict of the jury is contrary to the evidence.

Under these circumstances we cannot, as a matter of course, grant a rehearing.

The prayer of the petition is denied.

WILLIAM A. PATRICK ET AL., APPELLANT, VS. HUGH A. YOUNG, APPELLEE.

1. A bill of exceptions containing the evidence as given is the proper method by which the testimony upon a trial is brought to this court. Affidavits of persons present at the trial and of jurors in the case as to what a witness stated, although embraced in a bill of exceptions, cannot be here considered.
2. Where the "property in question" in an action of ejectment, as shown by the declaration, is a named lot in a city, a verdict that "we the jury find the defendant guilty of improperly withholding the property in question and find for plaintiff damages to amount of four hundred and thirty dollars," is sufficiently certain.

Appeal from the Circuit Court for Duval county.

The facts are stated in the opinion.

T. A. McDonell for Appellant.

A. A. Knight for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This was an action of ejectment brought in the Circuit Court of the State of Florida for the Fourth Judicial Circuit in Duval county. The general issue was pleaded. After trial and verdict for the respondent Young, who was the plaintiff below, defendants moved for a new trial, which being denid, after judgment, this appeal was prosecuted.

The grounds upon which a reversal is sought are two:

First. Because the plaintiff failed to prove possession in either of the defendants.

Second. Because the verdict rendered was so vague, uncertain and indefinite that judgment should not have been entered thereon.

We do not deem it necessary to discuss in this case the question whether, to entitle the plaintiff to recover in eject-

ment, the proof should show the defendant to be in possession. Upon the motion for new trial the court held that possession in the defendant was established by the proof. The evidence taken at the trial is not in this record. There is no bill of exceptions purporting to contain the testimony of the witnesses. There is a bill of exceptions containing affidavits of several persons stating that they were present at the trial, that they heard the testimony and giving their views as to whether possession in the defendant was established.

We have first the affidavit of T. A. McDonell and M. C. Jordan that they were present at the trial, that they paid special attention to the testimony, and that plaintiff did not prove possession in defendants. Next we have the affidavit of the foreman of the jury rendering the verdict, who states that the evidence was that the daughter of one of the defendants was in possession, her father living on the premises; that there was no evidence that the daughter held under the father, and there was no testimony showing that either of the defendants was controlling or managing the premises. Next we have an affidavit of F. F.L'Engle, who swears that he was a witness for the plaintiff in this suit, and that he testified that for some years past, and at the date of the sheriff's return upon the summons in this suit, and at the time of the trial, the defendant, William H. Kendrick, was in possession of the premises in controversy, and that his daughter was, and had been for some years, residing on the premises as a member of her father's family. We have next the affidavit of Fred. Bettilini, who swears that the witness, L'Engle, testified that Kendrick was in possession. To the same effect follows an affidavit of plaintiff's attorneys, as well as an affidavit of J. W. Archibald, another attorney.

As to the affidavits of the jurors, in so far as they im-

peach the verdict in this case, they cannot be considered. The record of a verdict implies a unanimous consent of the jury, and is conclusive evidence of that fact. 16 Fla., 395. Independent of this, however, even if the affidavits of all these parties are considered, we cannot see how we can disturb the action of the court. There is no bill of exceptions containing the testimony, and the affidavits, considering all of them, are certainly as much in favor of the verdict as against it. By treating this case in this manner we do not intend to sanction this method of showing to this court what was the testimony of a witness before the jury. The only proper method of doing this is to embrace the testimony itself in a bill of exceptions. What we here say is, that upon the record, improperly prepared though it may be, we see no cause for a reversal of the judgment of the Circuit Court on the ground that possession in the defendant was not proved.

The verdict in this case was, "We, the jury, find the defendant guilty of improperly withholding the property in question, and find for plaintiff damages to amount of four hundred and thirty dollars." It is assigned for error that this verdict cannot be sustained for want of certainty.

Ejectment was originally an action whereby a person ousted or removed from an estate for years might recover possession, but by means of a series of fictions it has long been used for trying disputed titles to corporeal hereditaments and possessory titles to real estate.

In many of the States the statutes very properly require the verdict to set out the metes and bounds of the estate recovered, as well as the nature of the title found to be in the plaintiff. In this State we have no such legislation—[Chapter 3244 of Laws of Florida, approved after this decision, McC.'s Digest, 481, requires the verdict and judgment to state the quantity of the plantiff's estate, and to de-

scribe the land. It also enacts that the plea of *not guilty* shall be held to admit defendant's possession, or in case of an adverse claimant, the adverse claim of defendant, and that a defendant must plead adverse claim or denial of possession specially—REPORTER]—and we must determine the sufficiency of this verdict by reference to the general principles of law controlling the subject, premising what we have to say with the remark, that we do not see that this record raises the question as the matter is not made the ground for any motion, nor do we see that it was in any way called to the attention of the court. 48 Ill., 53.

In ejectment, as in other actions, objections to the form of verdicts are not encouraged. Whenever the verdict is sufficiently certain to enable a court to give judgment and the sheriff to deliver possession, it will not be disturbed; and this certainty may be in the verdict itself, or by a reference to something of a permanent and public nature. This is the rule announced by the Supreme Court of Pennsylvania in the case of Bagey vs. Detroisler, 35 Penn. State, 413. See to the same point 14 John., 86; 2 Burr., 698. Lord Mansfield, in 2 Burr., 698, says: "The principle is true and just that where the intention is manifest and beyond doubt, the court will set right matters of form." Recollecting that ejectment is primarily a possessory action, we cannot say that the term "withholding" is inappropriate to a verdict in that action; indeed, in ejectment under some of the statutes, this term is used as the proper expression in which to frame the verdict. Such is the case in the State of Alabama, Olive vs. Adams, 50 Ala., 374. See also 9 Mich., 544.

In this case the land in question was lot number 25 in the town of La Villa, and we see no difficulty in the court awarding a writ of possession, or in the delivery of possession by the sheriff.

The judgment is affirmed.

HUGH A. YOUNG, APPELLANT, VS. JUDSON W. WHITNEY, APPELLEE.

1. In a suit by an attorney to recover compensation for professional services, defendant testifies that plaintiff's services "have been of no value, but had been a great harm to him;" but the whole evidence shows that the services had resulted favorably to his client, and there is no proof that any loss or delay had occurred by reason of plaintiff's management of his client's business, and there is no conflict of testimony as to the value of the services, the defendant's testimony cannot prevail against the proof of such value.
2. In foreclosing a mortgage, a *cestui que trust* is not a necessary party defendant, where the mortgagor holds the legal title under a secret trust, as the trustee represents the *cestui que trust.*

Appeal from the Circuit Court for Duval county.

This is an action of assumpsit. The entire claim of the appellee sued for was a balance of $274.55, due on an account of $339.55. The charges for professional services were: For foreclosing mortgage of Young vs. Kendrick, $132.70; for services in examining titles, &c., in purchase of land from Epping & Russel, $25; and services in ejectment suit, $75; and in chancery suit of Patrick vs. Young & Bowden, $50; and for services in suit pending against injunction bondsmen, Conant and Burch, $25. The other charges were for moneys advanced, &c., for costs. The parties to the suit were the only witnesses. The Referee, Mr. F. P. Fleming, found and gave judgment for the appellee's whole claim.

The other facts are stated in the opinion.

Alva A. Knight for Appellant.

LeRoy D. Ball and *White & Henderson* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Whitney sued Young for services as solicitor and attorney in foreclosing a mortgage, conducting an ejectment suit,

and charges for services and expenses in other matters. Defendant pleaded that he was never indebted as alleged.

The cause was tried before a referee, who found for plaintiff the amount claimed, and judgment was entered thereon, from which defendant appealed.

The evidence of both parties at the trial proved that the services mentioned in the declaration had been rendered by plaintiff as an attorney-at-law, and the plaintiff's evidence shows *prima facie* that the charges were just. The defendant testifies that the mortgage foreclosed by plaintiff for defendant was executed by a young woman to secure money borrowed for the purpose of paying for the property; that the title was conveyed to her at the instance of her father, who also negotiated the loan which she secured by her note and mortgage to Young; that the plaintiff, Whitney, knew all these facts, and in foreclosing the mortgage did not make the father a party defendant; that a tax certificate or tax deed was obtained by the father and conveyed to a third person; that in the foreclosure suit plaintiff neglected to make these other persons parties defendant, in consequence of all which neglect, appellant, who purchased at the foreclosure sale, was hindered and obstructed by suits and injunctions in obtaining possession of the property, and, in the opinion of appellant, the plaintiff's services in the matter had been of no value, but "on the contrary they have been of great harm to me."

The evidence shows that the plaintiff had, as a lawyer, foreclosed the mortgage and obtained a deed at the sale for defendant; that he procured a writ of assistance to put defendant in possession; was met in this by a bill and injunction in favor of the holder of the tax title; procured a dissolution of the injunction by a cross bill; the other party appealed therefrom, and a suit in ejectment was then prosecuted to judgement in favor of appellant, and a recovery

was had of the possession of the premises and several hundred dollars damages against a responsible person. Evidently the services were of some value.

Viewing this evidence as introduced for the purpose of showing that the plaintiff's services were not worth as much as is claimed for them, we find nothing upon which to base such a conclusion. It does not appear that the father of the mortgagor, even if he had been a *cestui pue trust,* (which is not apparent,) was a necessary party defendant in the foreclosure suit, (2 Jones on Mortgages, Sec. 1399;) nor that any delay or hindrance was occasioned in recovering the possession by reason of the omission to make him a party; nor does it appear that the plaintiff knew of any facts by which he could impeach the tax deed in the foreclsoure proceedings.

This tax deed seems to have been the basis or cause of the delay of the appellant in obtaining the possession of his property. The records of the proceedings in the several suits mentioned by witnesses are not before us, nor does it appear in any manner that the plaintiff was advised of facts which should have led him to proceed otherwise than he did; nor is there any evidence to show how much less, if anything, he was entitled to recover. The testimony of persons skilled in the practice of law might have been of some value upon this point. The judgment of the defendant, who is evidently not so skilled, certainly throws no light upon the question. There is then no evidence showing that the plaintiff's services were of less value than his testimony proved them to be worth.

The appellee in argument suggests that the testimony on the part of the appellant, tending to show unskillfulness or negligence of the plaintiff in conducting the business of foreclosure of the mortgage, was not admissible under the general issue to defeat a recovery, but such defence must be

specially pleaded. This question can hardly be considered, however, because no objection was made to the testimony when it was offered, and the whole case was submitted to the referee by the parties without exception reserved.

Upon the pleadings and testimony it does not appear that any error was committed by the referee, and the judgment is affirmed.

DAVID B. STEWART, PLAINTIFF IN ERROR, VS. WILLIAM MILLS, DEFENDANT IN ERROR.

1. In an action for the taking and detention of personal property the plea of not guilty puts in issue the taking and detention, and not the right of property and possession of the plaintiff. (C. C. Rule 75.)
2. Error cannot be assigned that the Judge gave or neglected to give instructions to the jury as prayed for by counsel, with his ruling thereon, or to sign and seal the same, unless his neglect or refusal was duly excepted to and so appears of record.
3. It is not error for the Judge to refuse to read to the jury the instructions prayed for, which he declines to give to the jury as his charge or instruction. It is only necessary that he give in writing his refusal to give the instruction as prayed.

Writ of error to the Circuit Court for Orange county.

Chapter 2096 of the Laws of Florida (McClellan's Digest, page 338) provides that "if either of the parties, or their attorneys, present to the Judge their instructions in writing on the point or points of law or exceptions taken arising on the trial, it shall be the duty of the Judge to declare, in writing, to the jury his ruling thereupon as presented, and pronounce the same to the jury as given or refused."

Rule 75, referred to in the opinion, provides that "in actions for taking, damaging or converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the

defendant having committed the wrong, but not of the plaintiff's property therein."

The other facts are stated in the opinion.

E. K. Foster and *John W. Price* for Plaintiff in Error.

H. C. Harrison for Defendant in Error.

THE CHIEF-JUSTICE delivered the opinion of the court.

This was a suit brought by Mills for the taking and detention of a quantity of corn, the property of plaintiff. The defendant pleaded simply not guilty.

After hearing the testimony and the charge of the court, the jury found for the plaintiff and assessed damages, upon which judgment was entered for plaintiff.

There are minutes of what purports to be testimony copied into the record, but we cannot examine or consider it, as it is not attested by a bill of exceptions as the testimony given on the trial.

The only exception noted in the record and attested by the Judge appears by the following entry: "Plaintiff's counsel asks the court to charge the jury that Mills' possession of the corn is not in issue in this case, as it is admitted by the plea of not guilty which only denies the taking.

"2. That the plea in this case only denies the taking of the corn by Stewart, and if they believe that he took it without the consent of Mills or Marshall, he is guilty of the conversion of the corn, and is liable to Mills for its value."

"The above instructions are given." This is signed and sealed by the Judge. "Defendant's counsel excepts to the above instructions," signed by the Judge.

Written instructions appear to have been asked by defendant's counsel, upon which the Judge endorsed: "The

within instructions refused," and signed the same. No exception was taken to this refusal or to the absence of seal.

As to the exception to the charge and instruction given at plaintiff's request and excepted to by defendant, it is remarked that the action was for taking and detaining plaintiff's property by defendant. The plea of *not guilty* puts in issue the taking and detention of the goods, but not the plaintiff's property therein. See Rule 75, Circuit Court Rules in Common Law Actions; Stephens' Nisi Prius, 2698.

The charge given by the court was, therefore, strictly in accord with the law of the case.

As no exception was taken to the refusal to give the instructions asked for on the part of defendant, there is no issue of law thereon before this court.

Counsel for plaintiff in error urges that under the act of 1877, Chapter 2096, it is manifest error of record if the Judge simply write "given" or "refused" upon the instructions prayed by counsel, but that it should appear that the Judge actually read the instructions to the jury and his rulings thereon as written.

When a record comes to us with the word "given" written against a paragraph of instructions, and signed and sealed by the Judge, we understand that he read to the jury the written instructions as the law of the case. If he did not give them in writing, it may be made to appear by a bill of exceptions. When the Judge writes "refused" against a desired instruction, we understand that he announced in writing to the jury his refusal to give the instruction prayed, unless the contrary appears by a bill of exceptions. In case of such refusal it is unnecessary to read to the jury the rejected instructions. 17 Fla., 888.

It might in some cases prejudice the party offering instructions if the Judge should read them and refuse them

in the presence of the jury, because they may seem to be favorable to the party offering them, or may be mere repetitions of a charge already given, and the impression left upon the minds of the jurors by such refusal may be mischievous.

The way to bring into question the action of the court is to note an exception at the time and incorporate the matter in a bill of exceptions, with so much of the proceedings as may be necessary to full understanding of the exception taken.

All the questions suggested in respect to the provisions of the act of 1877, Chapter 2096, have been considered in So. Ex. Co. vs. Van Meter, 17 Fla., 783; Sherman vs. State, ib., 888; Pottsdamer vs. State, ib., 895.

The judgment is affirmed.

THE FLORIDA CENTRAL RAILROAD COMPANY, APPELLANT, vs. H. BISBEE, JR., APPELLEE.

1. What is done under a decree is valid so far as third persons are concerned, notwithstanding the subsequent reversal of the decree. Where moneys collected under such decrees are applied by order of court to a debt of plaintiff to a third person, there is no remedy against such third person upon a subsequent reversal of the decree.

2. Where a receiver has moneys sequestered by him under a decree finding such moneys applicable to plaintiff's demand, and a portion of such moneys is applied by order of court to the payment of the claim of plaintiff's attorney against the plaintiff for his services in the suit, a subsequent reversal of the decree and of the order directing payment to the attorney of his claim against plaintiff, there being no supersedeas when the money was applied, gives the defendant no claim against the attorney.

3. A defence upon equitable grounds, which sets up as the substantial equity a defence at law, such defence at law having been already interposed by plea (such plea being a good plea,) should be disallowed.

Appeal from the Circuit Court for Duval county.

The facts are stated in the opinion.

James M. Baker and *John T. Walker* for Appellant.

H. Bisbee, Jr., in *pro. per.*

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an action of *indebitatus assumpsit to* recover money paid upon a judgment or order subsequently reversed upon appeal. The plaintiff in its declaration avers: That the defendant on the 27th day of July, A. D. 1876, procured an order from the Circuit Court for the Fourth Judicial Circuit to Joseph H. Durkee, then master in charge and possession of the Florida Central Railroad, under and by virtue of a decree in the suit of the State of Florida vs. the plaintiff and others, ordering the said Joseph H. Durkee, as such master and receiver, to pay to the said defendant the sum of six thousand dollars on account of fees claimed to be due the defendant for services as solicitor in said cause, upon which said order the said Durkee, as such master and receiver of the moneys of the said company, did then and there pay to the defendant three thousand dollars; and the said plaintiff, being aggrieved by said order, appealed therefrom to the Supreme Court of the State of Florida, which appeal coming on to be heard the said Supreme Court set aside and reversed said order to pay said amount of six thousand dollars to the defendant, whereupon a right accrued to the plaintiff to institute suit against the defendant to recover the amount of three thousand dollars, whereupon

the defendant became liable to pay the said sum, with interest, &c. Then follows a count for money had and received by the defendant for the use of the plaintiff. To this declaration there was a demurrer, but we do not see that any action was taken upon it.

The defendant filed several pleas. We examine them in their order. The first was substantially: That in June, A. D. 1870, as authorized by the provisions of several acts of the Legislature of Florida, the State of Florida issued and delivered to the Jacksonville, Pensacola and Mobile Railroad Company four thousand bonds of the State of Florida, of the denomination of one thousand dollars each, receiving from said company three thousand bonds of that company, and one thousand bonds of the Florida Central Railroad Company of one thousand dollars each, bearing eight per cent. interest, in exchange for the said State bonds; that the J., P. & M. Railroad Company sold a greater part of said bonds; that on the 20th day of March, A. D. 1872, the State brought a suit in the Circuit Court for Duval county against the said J., P. & M. R. R. Company, *et al.;* that afterwards, on June 22, 1872, by means of an amended complaint, the plaintiff in this cause, the Florida Central Railroad Company, was made a defendant; that said company denied its power to issue its said bonds, or that said bonds were a lien upon its property; that the State prosecuted this action to enforce the lien upon its property authorized by the laws, named as security for the payment of its bonds, as well as against the J., P. & M. R. R. Company, to enforce a like lien; that a judgment was obtained in said suit against the said J., P. & M. R. R. Company for six hundred thousand dollars interest accrued on its bonds, and that a judgment was recovered on the 18th November, A. D. 1875, against the plaintiff for the sum of three hundred and sixty-eight thousand dollars on

account of interest due on its bonds, which said judgment against the plaintiff ordered Joseph H. Durkee, as a master of this court, to take possession of the railroad and property of plaintiff, and to sell the same at public auction for cash, and make report thereof, and that said judgment is the decree mentioned in the plaintiff's declaration, under which the said Joseph H. Durkee, as master, acquired and held the said railroad property; that pursuant to the directions of said judgment said master acquired and held the said railroad property of the plaintiff, receiving the net incomes and profits arising from its operation, which said moneys, by the terms of the said judgment, the said master was required to deposit in the First National Bank of Florida, and which could only be paid out upon an order of this court, directed to said master, according to the terms of said judgment; that said master executed a bond (a description is here given of it which is not essential); that the said judgment also provided that the plaintiff should be entitled to a credit on said judgment for all moneys that should come into the hands of said master while in possession of said railroad; that on the 27th of July, A. D. 1876, the master being then in possession of said railroad, under said final judgment, which was then in full force, the State of Florida, then as trustee, prosecuting said suit against the plaintiff for the benefit of the holders of said State bonds and the trust estate, was indebted to defendant for service rendered as its agent, solicitor and attorney in said suit against the plaintiff; that the moneys then in the hands of the said master, deposited in the bank named, being moneys applicable to the payment of said judgment, and a trust fund for the benefit of said bondholders, for whose use and benefit the said suit was prosecuted, the said master, upon the order of said court, duly made and with the consent,

sanction and approval of the State, through its Governor, did pay to this defendant, about the 27th of July, A. D. 1876, the sum of three thousand dollars in check drawn by him upon said bank, in favor of this defendant, and the said sum was passed to the credit of the State of Florida for defendant's said services; and afterwards, about the 22d day of December, A. D. 1876, the State of Florida, as such trustee, through its Governor, and this defendant, had a full and final settlement for defendant's services as agent and solicitor, for services rendered in said suits and in other suits, and in this settlement the State of Florida and said trust estate received and obtained credit for the three thousand dollars, and the said State, the client of defendant, was discharged therefrom.

To this and the other pleas which we notice hereafter there was a demurrer.

The questions discussed upon the demurrer to this plea arise more from a difference in its construction than from conflict in opinion as to what is the law applicable to the facts when ascertained.

We think the plea, construed with reference to the declaration, presents this case: that the defendant, representing the State of Florida as attorney and solicitor, recovered, on the 18th of November, 1875, a judgment against the plaintiff corporation for the sum of three hundred and sixty-eight thousand dollars, on account of interest due on bonds of the plaintiff corporation held by the State; that under this judgment a master was directed to take possession of the property of the plaintiff, to sell the same, and to receive the incomes from its management; that the judgment provided that the plaintiff should be entitled to a credit for all moneys that should come to the hands of the master; that on the 27th of July, A. D. 1876, the master, having funds then in his possession realized by the management of

plaintiff's property under said judgment, the said judgment being in full force and effect, paid the defendant the sum of three thousand dollars upon the order of the court duly made and with the consent, sanction and approval of the State; that the said sum was passed to the credit of the State of Florida for defendant's said services as attorney and counsellor; and that upon a full and final settlement afterwards had between the defendant and the State, the defendant gave the State of Florida credit for this money thus paid. Subsequently, upon an appeal, both the judgment and the order were reversed.

The question here is, can the plaintiff corporation, under these circumstances, recover this money thus paid defendant for services as attorney and counsellor anterior to the reversal of the judgment and order? In contemplation of law, the moneys in the hands of the master at the time they were paid were moneys applicable to the payment of the judgment in favor of the State, the judgment being then in full operation, and the attorney and counsellor had a lien upon them for the amount of his claim for services in favor of the judgment plaintiff. The judgment being in force, this application of the funds was legal under the then existing circumstances. It was an application of money which might be properly appropriated to the payment of the sum due the judgment plaintiff, to the debt of such judgment plaintiff, in such manner as upon a reversal of the judgment the remedy of the plaintiff corporation here, if there was any, was by a writ of restitution against the plaintiff in the original suit, with or without a *scire facias,* as the case may be, and not an action of *indebitatus assumpsit* against the attorney to whose claim for services it had been legally applied before that time. The judgment plaintiff has applied money adjudged at the time to be applicable to the payment of her own claim to the payment of an un-

disputed debt due by her. The defendant in judgment must look to her, and not to her creditors. It will not be denied, upon the reversal of this judgment, that the Florida Central Railroad Company had a right to restitution as against the party plaintiff in the judgment. If this be so, it certainly must be evident that this corporation cannot recover as against the attorney. She cannot have a subsisting right of action against the party and against her attorney and agent at the same time.

The Supreme Court of the United States, speaking of this subject, says, (6 Pet., 8): "The reversal of the judgment gives a *new right* or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right, but as to strangers there is no such privity."

The presumption from this record, upon the face of the declaration and this plea, is that the proper method was adopted to have this debt of the State of Florida for services of her attorney and counsellor paid from the funds in the hands of the master and applicable to the claim of the Staet. The rule upon this subject in chancery is that "when a fund coming to his client is in court, the solicitor may present a petition for the taxation of his bill and for payment of it out of the fund." Dan'l Chy. Prac. and Pleadg., 5 Edition, 1845.

According to the authorities defining with accuracy this proceeding and a suit in equity, there is such a difference between them that there may be an application of moneys by such proceeding in the pending suit and yet not a recovery in a bill for an account. 9 Sim., 583, 588.

While in the time of Lord Hardwicke the rule may have

been otherwise, as counsellors could not then maintain an action for fees, the rule in this State, and in most of the States of the Union, is that upon such funds in the registry of the court the attorney for the plaintiff has a lien for a reasonable compensation for his services in obtaining such judgment or decree. 6 Fla., 258; 10 Wall., 493, 494; 14 Ga., 105.

The application of the funds here was legal and according to the judgment and order, which had not been superseded. These positions are clear, and we see no other question in the case except the one of privity. Was the defendant here such a stranger to the decree or judgment as prevents the existence of such privity between him and the plaintiff as is necessary to maintain this action of *indebitatus assumpsit?*. We think no such privity exists or existed. His claim was in no way any part of the foundation of the judgment against the Florida Central Railroad Company, nor did he, under the averments of the plea, make any claim against that company.

He was paid from money in *gremio legis* applicable to a judgment and decree between his client and the plaintiff here.

No question between the parties to this suit not already determined was necessary to be considered in the hearing of his peteition seeking payment out of these funds. The action of the court simply sanctioned and directed an appropriation of funds applicable to the claim of his debtor to him her creditor. The attorney of the State did not assume any other or new relation to the Florida Central Railroad Company than he had occupied before. He claimed, as attorney of the State, by virtue of a claim against the State, and while it is true that this act as attorney of the State was to enure to his own benefit, still this benefit resulted directly and solely from his relation to the State, and

indirectly through the relations of the State to the Florida Central Railroad Company. He made no direct claim against the Florida Central Railroad Company. And in view of the language of the Supreme Court of the United States referred to, any act resulting from the relations of the parties of the suit, which was justified by the judicial proceeding in its then present status erroneous though it may have been afterwards determined to be, as between the parties, must be sustained as to third persons.

A supersedeas is necessary to prevent such action. That would have stopped any proceeding of the court or its officers under the decree. If there is no supersedeas, then action of the court, in accordance with the decree, if the decree be afterwards reversed, can only be remedied by proceeding against the parties.

These conclusions are sustained by the principles announced in the following cases: 3 N. Y., 329; 20 N. Y., 306; 6 Pet., 15 to 19; 14 Ga., 89; 10 Wall., 494; 2 Mon., 972; 28 N. Y., 237; 18 N. Y., 371.

The other pleas are pleas on equitable grounds under the sixty-ninth section of Chapter 1096, Laws, being an act to amend the pleading and practice in the courts of this State. A plea under this statute is applicable only to a case at law in which, if judgment were obtained against the defendant, he would be entitled to relief on equitable grounds. Day's Com. Law Procedure, 328, and cases cited. It is obvious that all such equitable pleas have vitality and effect according to the case made at law. To be effective not only must a case at law be made against the defendant, but an equity which would be operative to give title to relief against the particular judgment to be given in that case must be disclosed by the plea.

The first plea here on equitable grounds recites first the facts set up in the plea just disposed of, and that the plain-

tiff can obtain credit for this sum in a suit alleged to be pending between it and the *cesti que trusts* of the State. We have seen that these facts are a sufficient reply to the case made by the declaration admitting that it makes a case, and it follows, therefore, that looking at the entire pleading no case for an equitable defence exists. If the facts here pleaded are available, they are available at law.

Whether the plaintiff here is entitled to credit upon the decree in the case of J. F. Schutte and others against it for this three thousand dollars, or whether the State, as trustee, would be entitled to a credit for that sum in its account with the *cestui que trust* as an amount disbursed by her in the management of the trust, are questions which in our judgment have no place here, as they are questions with which the defendant here has no concern as equitable defences, except in the event of his liability to judgment at law.

The third plea on equitable grounds recites substantially the matter of the first plea, and proposes to set off a debt due by the plaintiff to the State, as trustee, against the three thousand dollars claimed to be due it by the defendant, the agent and attorney of the trustee. What has been said of the second plea in principle disposes of this plea. The first plea being, in our opinion, a good defence, the judgment, to the extent that it overrules the demurrer, must be affirmed. The plaintiff, however, upon remanding the case may, under the practice in this State, have leave to reply to the plea upon showing a meritorious replication, to be filed in twenty days after the filing of the mandate of this court in the Circuit Court, in which case the court may set aside the final judgment upon the demurrer, and proceed in the case according to law, otherwise the final judgment to stand affirmed.

Judgment affirmed with qualification stated.

NOTE.—Section 27 of the act of November 23, 1828, provides: "That no demurrer, either at law or in equity, shall be considered as an admission of the facts set forth in the pleadings referred to so as to bar the person demurring from any substantial claim or defence which he might have urged if said demurrer had not been filed." Thomp. Dig., 331.

VanValkenburgh, J., did not sit in this case.

CHARLES O. LIVINGSTON, PLAINTIFF IN ERROR, VS. ROBERTS' EXECUTOR, DEFENDANT IN ERROR.

1. When a party in cross-examining a witness presses questions relating to collateral matters not testified to in the direct examination, he makes the witness his own as to the facts so brought out.
2. Testimony of impressions and conclusions, drawn from a conversation, is of little value against positive testimony giving the language used.
3. Proof of the circumstances under which the plaintiff, the indorsee of a note, purchased it in order to let in evidence of the want of consideration between the original parties, must be such as to necessarily create doubts of the good faith or innocence of the plaintiff in purchasing it.
4. Reputation that the payee of a note is a "conjurer and fortune teller," and proof that a probable consideration of the note was medicine and nursing furnished to a sick man by the reputed conjurer and fortune-teller, is not evidence that the note was given in consideration of "conjuring," &c., or that the consideration was illegal.

Writ of Error to the Circuit Court for Duval county.

This case was tried before Mr. T. A. McDonell as a Referee.

The other facts of the case are stated in the opinion.

M. C. Jordan for Plaintiff in Error.

C. P. Cooper in *pro. per.*

THE CHIEF-JUSTICE delivered the opinion of the court.

This was an action upon a promisory note made by John Roberts, December 29, 1876, payable to Mrs. E. G. Magruder or order for two hundred and fifty dollars sixty days after date, and alleged to have been indorsed to the plaintiff before due. The executor of Roberts filed sworn pleas to the declaration: First, That he was not indebted. Second, "That the note was obtained from the said John Roberts in his life-time, not many weeks before his death, while suffering from an incurable disease, by fraud, on false pretenses and without consideration by Mrs. E. G. Magruder, the payee, who claimed to be a conjurer, and proposed to cure said Roberts by witch-craft and conjury, and contracted to cure him or demand on pay, and pronounced him cured after performing her so-called conjuring and incantations and senseless manipulations or some other absurd things, and extracted from him in his weakened state of mind and body said promissory note; the said E. G. Magruder not being a physician by profession, and not having a diploma or certificate on file or of record as required by the statute: and defendant says that said John Roberts was not cured, but died of the disease which she professed to cure in a few weeks after her 'conjuring' as aforesaid." Third, Defendant alleges that plaintiff in not an innocent holder for value, but had notice of the facts above stated, and bought said note from the payee with full knowledge of said facts, and gave a totally inadequate consideration therefor in consequence of the doubtful and illegal manner of obtaining the note by the payee. The pleas were sworn to. Plaintiff joined issue upon these pleas, and the cause was referred to a referee for trial,who rendered judgment for defendant. Plain-

tiff brings a writ of error. The defendant insists that the consideration of the note having been denied on oath, it was incumbent on the plaintiff to prove the consideration as between the original parties, under the provisions of section 24, act of 1827, Thomp. Dig. 331, to-wit: that "it shall not be necessary for the plaintiff to prove the execution of any bond, note or other instrument of writing purporting to have been signed by the defendant, nor the consideration for which the same was given, unless the same shall be denied by plea" put in on oath.

This provision has been construed in White vs. Camp, 1 Fla., 94, to require the plaintiff to prove the consideration when he is a party to the original note, and the consideration is denied by plea on oath, and not when the plaintiff is the assignee or indorsee. In other words, the rule of the common law as to inquiring into the consideration remains unchanged, except that the defendant may, by plea on oath, compel the payee plaintiff to prove the consideration of a note sued on.

It is held, however, in Prescott vs. Johnson, (8 Fla., 391,) that where it shall be made to appear that the plaintiff purchased the note under suspicious circumstances, such as necessarily cast a shade upon the transaction and put the holder upon inquiry, the holder must prove the consideration where such plea is put in. Whether the rult in White vs. Camp or that in Prescott vs. Johnson is the sounder one, it is not necessary to decide in this case.

What are the suspicious circumstances under which the plaintiff purchased this note?

The plaintiff testified in his own behalf that the payee called on him to ascertain whether he would take a note of John Roberts' for some goods out of his store. Afterwards she brought the note and delivered it to him in payment of a bill of goods purchased, amounting to $267, something

more than the face of the note. The defendant then proved by plaintiff, by way of cross-examination, that at the time he purchased the note he did not know for what consideration the note was given, but that the payee informed him that Roberts owed her for doctoring, and owed for other things some four or five hundred dollars; that he made no inquiry as to the consideration or the character of her business, but afterwards heard that she was called a doctress, and told fortunes. Mr. Ledwith, a witness for defendant, testified that he heard a conversation between plaintiff and Mr. Cooper in which he understood that the basis of Mrs. Magruder's claim was that she had been doctoring or conjuring Mr. Roberts; that the words "conjuring" and "fortune-telling" were used by plaintiff. He was "strongly of the belief" also that plaintiff "admitted that he knew before he traded for the note the peculiar character of the note, and the circumstances under which the same was given." Ledwith says there was something said about the inadequacy of the amount given by plaintiff for the note, and that plaintiff said in explanation that he had some doubts about collecting it, owing to the nature of the claim.

L'Engle, for defence, testified that Mrs. Magruder's professed occupation was that of a doctor; her reputation was that of a "conjurer, dealing in roots, herbs and spells." She said she was treating Mr. Roberts during his sickness. He was then of a weak mind. (This was given under objection and exception, that failure of or illegal consideration for the note had not been shown.)

C. P. Cooper, executor of Roberts, testified that Roberts died February 16, 1877; that when plaintiff presented the note for payment he asked him what the consideration of the note was, and plaintiff answered that it was given to Mrs. Magruder by Roberts "for conjuring him to make him well;" that Mrs. M. was an old woman who lived by

conjuring and fortune-telling; that she professed to be a kind of a doctor, but not a regular doctor. On asking Livingston what he had given for the note, he "laughed and said he did not give much, or something of that sort; had given a little food for her horse or cow and a stove." He said he had given so little for the note because he had doubts about the note and taken chances, or words to that effect. "He admitted to me, then and there, that he knew at the time how Mrs. Magruder had got it."

Frederick Luders testified that he was acquainted with Mrs. Magruder; she seemed to be a doctress, made medicines herself and brought them; she attended Mr. Roberts, who sent for her; she attended him several weeks; on a certain morning she did not come, and Roberts sent for her; she sometimes stayed with him two or three hours; I was there often at night, and she would give him medicines, and was sometimes alone with him, Roberts requesting that everybody else would go out of the room, as Mrs. M. wanted to be by herself with him; never saw her practice "conjuring;" I was with him a good deal, and the last four or five days all the time; I don't think he was a man easily imposed on, or had a weak mind; was with him most of the time, and he talked some sense.

Cross-Ex.—Mrs. M. attended Mr. R. about three weeks, calling on an average about every other day, remaining on an average one to three hours; she stopped visiting him three days before he died; during his last illness of eleven months several regular doctors attended him; Mr. Roberts said the doctors never did him any good, and thought she had done him some good.

Plaintiff recalled, said he never made use of the word "conjuring" in Mr. Cooper's presence; did not know the meaning of it; never told Mr. Cooper or Ledwith that the note was given for "conjuring" Mr. Roberts; did not say

to Cooper that the consideration I gave for the note was inadequate, but I gave stoves, feed and goods in my line.

This is substantially all the testimony in the case, and proper judgment depends mainly upon a careful examination of this evidence.

It appears therefrom that the plaintiff gave in exchange for the note goods invoiced at $267, there being no dispute as to the fairness of the invoice offered in evidence, and that the purchase of the note was before it was due. Mr. Cooper's and Mr. Ledwith's recollection of the conversation with Mr. Livingston as to the price paid for the note is too indefinite to overcome this proof.

Mr. Ledwith's testimony as to his impressions, and what he "understood" from the conversation between Cooper and plaintiff, his attention being attracted by the words "conjuring" and "fortune-telling," and his "strong belief" that plaintiff admitted that he knew before he got the note the circumstances under which the note was given, is too indefinite in its treatment of facts to affect the rights of the parties. Indeed the whole testimony of Mr. Ledwith is little more than a statement of impressions.

Mr. Cooper says plaintiff told him the note was given by Roberts to the payee "for conjuring him to make him well;" that she was an old woman who lived by conjuring and fortune-telling; a kind of a doctor, but not a regular doctor, and that he gave a small price because he had doubts about the note, and taken chances, "or words to that effect," and that "he admitted to me then and there that he knew at the time how Mrs. Magruder had got it."

The testimony of Mr. Luders shows that Mr. Roberts sent for Mrs. Magruder to doctor or nurse him, and she was there frequently and for several hours at a time; made medicines for him and administered them; when she did not come he sent for her; never saw her practice "conjur-

ing;" Roberts was a man not easily imposed on, nor of weak mind, and talked sound sense; witness was with him through his sickness, and Roberts thought Mrs. Magruder's treatment had done him more good than that of the several physicians who had attended him.

There is no direct proof here to show what was the actual consideration of the note, but it is shown by testimony produced by defendant in his cross-examination of plaintiff upon matters not referred to in his direct examination, that the plaintiff not only paid a valuable consideration for the note, but took it with no notice or knowledge what the consideration was; and was actually informed by the payee, upon his inquiry before the note was brought to him, that Roberts owed her for doctoring, and other things, several hundred dollars, and that after he took the note he heard she was a doctress or fortune-teller. This testimony so brought out is testimony produced on the part of the defendant. It is a sound rule that a witness cannot be cross-examined to a distinct collateral fact, for the purpose of afterwards contradicting him. He makes the witness his own. 5 Wend., 301; 2 Dev. & Bat., 39; 2 Caines, 178. The testimony of Mr. Ledwith and Mr. Cooper was in some respects an apparent contradiction of a part of the testimony of the plaintiff as a witness examined by defendant, and by which the defendant is bound, if the strict rules of law are applied. Mr. Cooper's testimony is the only evidence substantially contradicting that of the plaintiff, and that is in respect to what plaintiff had said to him as to the consideration of the note and his knowledge of it when he bought it.

Mr. Cooper says plaintiff told him what the note was given for, and that he knew it at the time. Plaintiff says he did not tell him so, and he didn't know when he bought

it what it was given for, but had heard afterwards that the payee was a "doctress or a fortune-teller."

Taking this testimony all together, there is no proper proof of such suspicious circumstances in respect to the purchase of the note, or of notice to the plaintiff of any defect in the consideration, as to require him to prove the actual consideration for which the note was given, according to the strictest reading of the opinion of the court in Prescott vs. Johnson. But the testimony of Luders fortifies the plaintiff's testimony as to Roberts' indebtness to Mrs. Magruder. There is no testimony tending to show anything about "conjuring" or other "humbug treatment" of Roberts by Mrs. Magruder. She prepared and gave him medicine, and spent much time in doctoring and nursing him. What "other things" entered into the consideration of the note we cannot learn from this testimony.

When there have been business transactions between parties, and a note is given by one to the other, a consideration for the giving of the note may naturally be referable to such previous or current business affairs of the parties, and so if necessary the testimony here as to services rendered by the payee at the request of the maker may be applied to show an indebtedness in support of the consideration of the note in question, and the words "value received" expressed in it.

We do not find any evidence of the fraud, witchcraft, conjury or false pretenses, alleged or alluded to in the pleas. These are allegations to be proved, if available, as defences or in support of the plea of want of consideration. There is no sound rule of law which requires this plaintiff to negative such allegations of grounds of defence.

The judgment must be reversed and a new trial granted.

THE COMMISSIONERS OF SUWANNEE COUNTY, APPELLANTS, VS. THE COMMISSIONERS OF COLUMBIA COUNTY, APPELLEES

In a proceeding to re-establish certain bonds executed by the officers of one county and burned while in possession of the officers of another county, the latter being the payee, the former pleaded to the petition for the re-establishment that the bonds were not lawfully delivered; that they were illegal and void for fraud, want of consideration; that the bonds were satisfied and no liability ever existed: *Held*, That these and kindred matters constituted no valid objection to the re-establishment, but were matters of defence to be set up in proceedings to enforce the bonds.

Appeal from the Circuit Court for Suwannee county.

Suwannee and New River counties were created from portions of the territory of Columbia county. Columbia county had subscribed for and received stock in the Florida, Atlantic and Gulf Central Railroad Company. The act of 1858, (Chapter 895), referred to in the opinion, provided that upon the organization of Suwannee and New River counties, the Commissioners of Columbia county should transfer to each of the other counties so many shares of the stock as would constitute a fair division between the three counties, on the basis of the taxable property of these counties under the last assessments. Upon the transfer of the stock the Commissioners of New River and Suwannee counties were to issue bonds of their respective counties, payable to Columbia county, in the same amounts as the stock received, payable like those issued by Columbia county for the entire stock. (Chapter 1047.)

The other facts are stated in the opinion.

White & Bryson for Appellants.

A. B. Hagan and *C. R. King* for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

The County Commissioners of Columbia county filed a petition to re-establish certain bonds alleged to have been issued by the County Commissioners of Suwannee county under the 15th and 16th sections of "an act to create the counties of Suwannee and New River," approved December 21, 1858. It was alleged in the petition that the bonds were executed and delivered by the County Commissioners of Suwannee in 1861 to the Commissioners of Columbia county, pursuant to the act and for the consideration therein named; and that said bonds, being in the possession of the Judge of Probate, who was *ex-officio* President of the Board of County Commissioners of Columbia county, were destroyed by fire on the 9th of October, 1867, and petitioners pray that an order be made re-establishing the bonds so destroyed, "and that the same be as valid and effectual for all commercial or legal purposes as the originals could have been had the same never been destroyed, and that petitioners may be allowed to use the same for all commercial purposes the same as though they were the originals."

The respondents filed an answer to the petition setting forth substantially the following grounds of objection to the granting of the order prayed for:

They deny the delivery of the bonds to petitioners or their predecessors; they allege that the bonds were void in law; the bonds were without consideration; the law was not complied with, and therefore the officers of Suwannee hand no authority to issue them; the bonds were obtained by misrepresentation and fraud; that Columbia county has received full satisfaction for the bonds.

The act of March 2, 1877, (Chap. 3019,) under which the proceeding was had, provides that whenever any instrument in writing in the hands or official control of any officer of a court or Board of County Commissioners has

been destroyed by burning, &c., the same may be re-established upon petition to the proper court, notice being served on the parties to be affected thereby, who shall "plead to the petition." The order to be made by the Judge is one "re-establishing the record process, instrument, pleading or paper, and the same as re-established by such order shall be of the same validity as the original."

The petitioners demurred to the plea, and the demurrer being sustained. and an order entered by the Circuit Judge re-establishing the bonds, the respondents appealed.

There was very much more in the petition than was necessary to present the material facts required to be stated. The facts stated and admitted to be true, that certain bonds were executed by the proper officers of the county of Suwannee under the acts referred to and for the purposes stated; that such bonds were in the possession of the President of the Board of Commissioners of Columbia county, and were burned; that the copies presented were substantial copies of the bonds destroyed—were the only facts material to be presented.

If the matters embraced in the plea constitute a defence against the enforcement of these bonds, as the question of the lawful authority to issue them, the right of Columbia county to receive them, the question of want of consideration, or failure of consideration, fraud. satisfaction, or of the ownership, or the amount equitably due upon an accounting—these are matters proper to be presented by plea or answer when a proceeding shall be commenced to enforce them.

The facts set up by the respondents do not controvert the execution of the bonds for the purposes mentioned. their possession by the petitioners' predecessors and their destruction.

The re-establishment of this proceeding gives no greater

right to Columbia county than it possessed before; nor does it create any new liability on the part of Suwannee. The destruction of the bonds did not affect the rights or liabilities of either county, even without a renovation of the bonds. The law gives the right to have certain destroyed papers "re-established" for what they may be worth.

The allegation of respondents, that a former suit is pending, by mandamus, between the parties or their predecessors, is not an answer or bar to this proceeding.

The prayer of the petition, that the petitioners be authorized to use the re-established bonds "for all commercial purposes," &c., was superfluous, but this constituted no valid ground of objection to the prayer for the reproduction.

The judgment of the court in overruling the plea and granting the material prayer of the petition must be affirmed with costs.

Order affirmed.

JOHN S. HARRIS, APPELLANT, VS. SARAH P. FERRIS, ET AL., APPELLEES.

An appeal in an equity cause having been dismissed for want of prosecution or for irregularity, the merits of the cause not having been passed upon, a second appeal may be taken within the time limited by the statute from the entry of the decree.

Appeal from the Circuit Court for Duval county.

The former appeal referred to in the opinion was dismissed at the June Term. A. D. 1880. on account of the failure of the appellant to file in this court a transcript of the record and proceedings, as required by the statute and rules of practice.

The other facts are stated in the opinion.

J. C. Marcy & Son for the motion.

Fleming & Daniel, contra.

THE CHIEF-JUSTICE delivered the opinion of the court.

At the June Term, 1880, an appeal was dismissed under the statute. (Th. Dig., 448.)

A new appeal was afterwards taken, and a motion is now made to dismiss it on the ground that the former appeal having been dismissed, the decree was thereby affirmed and the right of appeal exhausted.

An appeal dismissed for informality does not prevent a party appealing a second time within the time prescribed by law for taking appeals. (Yeaton vs. Lenox, 8 Peters, 123.)

Where an appeal has been dismissed for want of prosecution, a second appeal may be allowed. (U. S. vs. Fremont, 18 How., 37, per Catron J.; U. S. vs. Curry, 6 How., 113.)

Dismissal of appeal for informality or want of prosecution does not bar appellant from taking and prosecuting another appeal within the time allowed by law for appealing. (Steamer Virginia vs. West, 19 How., 182.)

In Brill vs. Meek, 20 Mo., 358, (Law,) an appeal was dismissed for want of prosecution, and a writ of error was allowed.

On several occasions in this court, when an appeal had been dismissed for want of prosecution and other grounds not involving the merits of the causes, a writ of error has been afterwards allowed for the purpose of reviewing the same judgment, the statutory period for appealing having elapsed. The cases, however, as reported (except Benbow vs. Marquis, 17 Fla., 441,) do not mention the point, as no question seems to have been raised by counsel.

In cases at law an appeal in short time or writ of error may be had for the purpose of reviewing proceedings taken

in the progress of the cause, while in chancery an appeal only is allowed, and two years are allowed for suing out a writ of error at law or an appeal in equity causes.

The effect of an appeal or writ of error in csaes at law is to bring the matter before the Appellate Court for review, the appeal being a statutory substitute for the writ of error.

It was remarked that if second appeals were allowed it would open the door to abuses by successive appeals, and would lead to delay and annoyance; but as cases arise the court will determine as to the good faith of appellants, and endeavor to protect itself and opposing parties against imposition.

The correct rule, in our judgment, is that where an appeal is dismissed for irregularity, or for want of prosecution, the merits of the cause not having been determined by the Appellate Court, a writ of error or a second appeal may be allowed, if not prosecuted in bad faith, within the time limited by law.

In this case the second appeal, though there appears to have been some neglect by the clerk below in the matter of the citation, seems to have been properly taken, and the motion to dismiss is denied.

JOHN S. HARRIS, APPELLANT, VS. SARAH P. FERRIS, ET AL., APPELLEES.

1. A party entering into possession of property as lessee for a term of years under a contract to expend $1,000 in improving the property and to divide net profits with the lessor, is under obligation to keep an accurate account of his receipts and disbursements. These accounts the lessor has a right to examine. Where the lessee fails for years to render an account, keeps his accounts, such as they are, in an awkward and unintelligible manner, and makes expenditures unauthorized by his contract, his conduct is such as not to recommend him or his statements to favorable consideration.
2. Where the testimony upon which the master stated an account is lost, the appellant admitting that it was the principal testimony relied upon by both parties in the matter of expenditure, the action of the court sustaining the master must be presumed to be correct. In such a case, unless the appellant can show, in the absence of this testimony, "that no case could have existed, it being present," he cannot prevail.
3. A lessee thus in possession is not entitled to personal compensation for managing the property.
4. Where, upon a second reference, after exceptions to master's first report allowed, order of confirmation having been passed as to other matters, the master corrects a mistake in an allowance made in the first report, which was not made the subject of exception thereto, such second report being in this respect outside of the second order, is erroneous to that extent. The proper method to correct this error is not to except, but to apply to the court to refer the matter back for review. Where this method is not adopted and the matter is improperly made the subject of an exception, which the chancellor overrules, this court, upon appeal, will not reverse the decree if the matter of the exception was within the accounting directed by the original decree, and the presumption is that the action of the master and the court was just and proper.

Appeal from the Circuit Court for Duval county, to which court the case has been transferred from Clay county.

The facts of the case are stated in the opinion.

Fleming & Daniel for Appellant.

J. C. Marcy & Son for Appellees.

MR. JUSTICE WESCOTT delivered the opinion of the court.

Eliza Palmer and Halsted H. Hoeg, administrators of David L. Palmer, deceased, and Sarah P. Ferris, filed this bill against John S. Harris. Pending the suit, Eliza Palmer and Hoeg died, and James T. Wilson, administrator *de bonis non* of Palmer, continued it.

Plaintiffs allege that on the 13th of October, A. D. 1869, and during the life-time of Palmer, he and plaintiff, Ferris, "leased and let" the Sulphur Springs at Green Cove Spring, and the land upon which it is situated, in Clay county, for the term of ten years to Arthur F. Aldrich, the lease commencing December 1, 1869, with a privilege of renewal for ten years, Aldrich agreeing to expend for improvements on the spring and grounds one thousand dollars, and to pay Palmer and Ferris one-half of the net profits arising from the spring and grounds, the one thousand dollars not to be estimated as an expense.

The lease executed allowed Aldrich the privilege of laying a pipe from the boil of the spring to be used for conveying water to the hotel square so long as a hotel should be kept on the square. There were reservations of the privilege of use for the family of the plaintiffs and other parties, and other reservations in the lease which it is not material to mention.

That plaintiffs having great confidence in Aldrich, relied upon him to draw up the papers. Plaintiffs allege that in this lease there was a mistake concerning the pipe mentioned connecting the sulphur spring with the hotel lot across Saratoga street, it being the intention of the parties that the pipe should be used in the connection mentioned

only for the term of the lease, and not "so long as a hotel might be upon the lot."

Plaintiffs allege further that some time after the execution and delivery of this lease two other papers were presented to the said Palmer and Ferris in the presence of a judicial officer of the State of Florida, which were represented to be duplicate of the lease which they had already signed, and "that this duplicate or duplicates were for the purpose of simply getting another lease to have recorded, which representations were false; that said papers were not duplicates, that instead of reciting a term of ten years plaintiffs afterwards learned that it recited twenty, and that instead of being a lease to Aldrich exclusively, it was to him, his heirs, assigns, executors and administrators." A copy of this second lease is in the bill—annexed to it is a certificate of one of the witnesses "that the words 'his heirs, executors, administrators or assigns,'" and the words "No. (meaning number) one hundred and ninety-six" were interlined before the signing of the lease, and an acknowledgment of Palmer and Ferris that they executed the instrument for the purposes therein expressed. There is also an assignment of the lease by Aldrich to Harris, the defendant.

Plaintiffs allege delivery of possession under the first agreement, and that the alleged fraud was not discovered until after the death of David L. Palmer, who died April 17, 1871. They allege that defendant, Harris, was a party to this fraud; that he went into possession under this fraudulent lease; that he has refused to surrender it, and that he has appropriated the rents and profits of the property.

Plaintiffs pray for an account of the rents and profits of the property, that the error in the matter of the pipe contract be changed to conform to the real agreement, that the

second lease may be "delivered up" and "cancelled of record," and for general relief.

Defendant, Harris, answered that the first paper mentioned in the bill was considered by the parties as a mere agreement for a lease afterwards to be carefully drawn and executed; that it was understood when this lease was executed that Aldrich had no money of his own to apply to these improvements, and that he relied upon the defendant to supply the necessary funds. He denies that there was any mistake made as to the pipe contract, affirms that everything was understood and was fair in the matter of the lease of the first of December, A. D. 1869, and expresses a willingness to account in accordance with the terms of his contract. He denies any right of plaintiffs to a surrender of the lease.

After testimony bearing upon the questions, the chancellor decreed that the second lease was the true contract between the parties, that their intention was that Aldrich should expend one thousand dollars in improvements upon the property, that it was afterwards to be kept in repair, and that necessary expenses in connection with the proper management and protection of the property should be paid.

The chancellor decreed further that the contract as to the pipe was as stated by the defendant.

The question as to which was the lease between the parties and the difference as to the contract concerning the pipe being settled by the court, and there being no appeal from such part of the decree as determined these questions, it is unnecessary to insert such testimony as is applicable to them. A part of the testimony brought out in this examination, which principally concerned the matter of the lease, consisted of the following "Spring account" which had been delivered to Hoeg, one of the administrators of the lessor Palmer:

"SPRING ACCOUNT."

1873.		*Receipts.*	*Expend's.*
May	1—By receipts from May to date.....$1,310.09		
	1—To expenses from Jan. to date.....		$4,686.39
	31—By receipts for May, 1873.....	37.05	
	31—To keeper's board and wages for May $39.00		
	31—To other expenses..... 46.00—		85.00
June	30—By receipts for June, 1873.....	31.80	
	30—To keeper's board and wages for June $38.00		
	30—To other expenses..... 15.50—		53.50
July	31—By receipts for July, 1873.....	33.70	
	31—To keeper's board and wages for July $37.30		
	31—To other expenses..... 4.00—		41.30
Sept.	30—By receipts for Aug. and Sept., 1873.....	17.00	
	30—To keeper's board and wages for Aug. and Sept.....		58.01
	30—No other expenses.....		
Oct.	31—By receipts for Oct., 1873.....	4.00	
	31—To keeper's wages for Oct., 1873...$4.00		
	31—To other expenses..... 1.00—		5.00
Nov.	30—By receipts for Nov., 1873.....	4.00	
	30—To keeper's wages.....		4.00
	30—No other expenses.....		
Dec.	31—By receipts for Dec., 1873.....	8.45	
	31—To keeper's wages.....$8.45		
	31—To painting, white-washing, &c.....44.35—		52.80
1874.			
Jan.	20—By receipts from Jan. 1 to 20.....	10.25	
	20—To wages of keeper.....		10.25
	20—The receipts of the Spring from October 1 to Jan. 20, were allowed to Mrs. Sweat, a keeper, in compensation for her services during that time by agreement with Dr. Applegate.		
	31—By receipts from Jan. 25 to Feb. 1.....	43.75	
	31—To keeper's board and wages.....$13.67		
	31—To other expenses..... 4.20—		17.87
Feb.	28—By receipts for Feb.....	159.50	
	Amount carried forward.....$1,659.59		$5,014.12

		Receipts.	*Expend's.*
	Amount brought forward	$1,659.59	$5,014.12
Feb.	28—To keeper's board and wages for Feb.		36.00
	28—No other expenses		
Mch.	31—By receipts for March, 1874	326.45	
	31—To keeper's board and wages for March $39.00		
April	20—To other expenses 47.35—		86.35
	20—By receipts April 1 to 20	107.60	
	20—To keeper's board and wages to 20 $25.33		
	20—To other expenses 40.52—		65.85
		$2,093.64	$5,202.32
	Gents—Above footings show the total receipts and expenditures of the Spring from the start to April 20, 1874. The expenditures include the amount of $1,000, which was to be laid out by Messrs. H. & Co. Deducting the amount	1,000.00	
	The Spring account stands debit April 20, 1874	2,108.68	
		$5,202.32	$5,202.32

A true copy. (Signed) J. R. ADAMS.

This account, appearing in the testimony concerning the lease, the court in the decree establishing the lease ordered its reference to a special master for examination, with authority to take testimony as to its correctness under the construction given by the decree to the contract of lease.

The master reported that he had examined all of the witnesses produced before him, and had carefully examined the books and exhibits that were placed in evidence by the respective parties. He states that he has had to rely, to a great extent, upon the testimony of the witnesses, "as the books of the defendant have been kept in such an awkward and unskillful manner that they are made to deal in vague generalities, whence very little information can be gleaned;

that quite a unmber of charges are made under general terms, without any effort being made by way of explanation."

The master then states the gross receipts as derived from the testimony of the defendant. The defendant's testimony is, as stated by the master, that "embracing the last seven years the average gross receipts per year have been four hundred and seven odd dollars, leaving off the two first years of the seven before the main pools were built, the average for the remaining five years was six hundred and one dollars."

For ground rent of a store erected on the spring property he charges, for seven years, one hundred and forty dollars, making the aggregate gross earnings of the spring the sum of $3,115. As expenditures he allowed the sum of $1,799, thus: For taxes, $360; for hire of keeper of spring, $384; for board for keeper of spring, $720; for advertising spring, $50; for soap and towels, $75; for repairs, $210; total, $1,799.90, leaving net earnings $1,316, one-half of which sum is six hundred and fifty-eight dollars. From this sum he deducts what is called gross rent, $140; leaving $518.

He explains these credits thus: As to the taxes he states, "Mr. Applegate testifies that the spring property was assessed at ten thousand dollars, and that their entire property, inclusive of the spring property, was assessed at thirty-seven thousand dollars, but that the whole amount was subsequently reduced to eighteen thousand dollars." He continues: "On making the proper proportion I ascertain that this amounted to an assessment on the spring property of four thousand eight hundred and sixty-four dollars, inclusive of defendant's store house. *But on a further investigation I learn* that the spring property was assessed much lower at other times. I therefore consider that three thou-

sand dollars per year for six years (the tax for 1876 being unpaid) would be a fair and equitable assessment of their portion of the property." Then follows a statement of the testimony as to the rate of taxation, but as no objection is made to the rate as fixed by the master, it is unnecessary to insert it here.

As to the charge for the hire and board of keeper, he says: "The evidence shows that the keeper was charged divers amounts for board, and that while her salary was uniform in the amount paid, the employment for a stipulated sum in money was not mentioned; that at certain periods of the year she was allowed to receive the receipts of the spring in compensation for her labor. The periods of time would annually extend to four months, consequently, in making a charge four months must be deducted from the year and the charge made for eight months; and as the keeper was paid eight dollars per month, this would make her salary sixty-four dollars per year. Upon the testimony of Mr. Applegate the expense of caring for the spring until June, 1870, which to June, 1876, would constitute a period of six years, and at the rate of compensation heretofore mentioned, would aggregate for that length of time $384." As to the item of board, the master says: "In the matter of the board of the keeper, I cannot but regard the charges made by the defendant as extravagant. The defendant was running a hotel, and, for his own convenience, furnished the woman who cared for the spring with food from the hotel table, but it is not in evidence that she was furnished like a regular boarder and placed at the first table, and served in the same manner with the guests of the hotel. But it is in evidence that she eat at a table by herself; *and from the testimony* I conclude that in the matter of board she was regarded and treated as a menial, and not as a boarder. I must, therefore, disallow the charge

of thirty dollars per month, and settle upon an amount that would have secured a woman of her position in life, which was an humble one, good, comfortable board in a place like Green Cove Spring." He then allows ten dollars per month, making an aggregate of $720.

Of the charge for advertising, he says: "Taking as a basis the advantages" (we presume this to be a clerical error, and that it should be advertisements,) "placed in evidence, I conclude that fifty dollars would cover the *pro rata* share that should be charged to the spring account. In considering this charge we must recognize the fact that the advantagement" (we presume this word should be advertisements) "of the spring were entirely ancillary to the advertisement of the Clarendon Hotel, and by way of inducing patronage to the hotel." The master continues, "as to the charge for soap and towels furnished for the spring, the evidence shows that there was a kind of copartnership arrangement in the use of these articles between the hotel and the spring; that they were purchased jointly and used jointly. The exact cost of these articles I cannot ascertain. Neither the evidence nor the books give the required information. I estimate the *pro rata* share of the spring to June, 1876, at seventy-five dollars."

As to the repairs, the master says: "In regard to the necessary repairs, I am compelled to solve the matter in the same manner that I solve the soap and towel question. In my opinion thirty dollars a year would cover the cost of repairs, making, for the seven years, two hundred and ten dollars." The master reports that he is convinced that in order to render the spring profitable, the defendant expended, in the outset, a larger sum than one thousand dollars upon the property, but considers that he has nothing to do with these sums under the order.

There were to this report ten exceptions. The first was because the master, in computing the receipts, did not take the exact figures shown by the testimony, but made an average estimate. The second was because the ground rent of the store was improperly included as a source of reveune to the spring. These two were sustained. The other eight exceptions were overruled, and the case was again referred to the master, with instructions "to reform his report to conform to the ruling of the court."

The master makes a second report under this order, in which he states that he has predicated all averages upon the actual figures given in evidence, and that his report is based upon their evidence. He deducted the ground rent. In this report he suggests that the charge for board of keeper is an error, and that it should have been for four months at ten dollars per month, and he in a new account stated allows the sum of $280 instead of $720, the sum allowed in the first account.

The defendant excepted to this supplemental report because it did not conform to the order to the master, because it did not conform to the order of the court directing exact figures to be taken as the basis of the estimate of receipts, and because of the reduction in the credit of seven hundred and twenty dollars.

These exceptions were overruled, and a decree passed for the sum due according to the report of the master.

The ground upon which a reversal of the decree is sought is the overruling these exceptions to the original and supplemental reports of the master.

All of the testimony taken under the reference of the account marked exhibit "C" before the master has been lost, and there is no testimony in the record but that used by the court in determining the questions raised as to the leases.

As the appellant contends that this testimony to some

extant sustains his exceptions, we insert so much of it as relates to the matter of exceptions.

Mrs. S. P. Ferris states that she never received anything on account of the spring or any statement of its earnings, and that there was no agreement that the earnings should be applied to the further improvement of the spring, that she was never asked about it, and that it was agreed that $1,000 should be expended by Aldrich in improving it.

H. H. Hoeg, administrator of D. L. Palmer, states that he got at one time a statement of the earnings of the spring. The statement appears hereafter as exhibit C. In this there occurs, as will be seen by reference thereto, an item of a lumping charge of $4,686.39 for "expenditures." He states that he did not authorize an expenditure of the earnings of the spring upon its improvement; that he had one conversation with defendant, Harris, about the spring lease generally, in which he spoke of the earnings of the spring, and that he did not understand that any of the profits of the spring were to be used for the improvement of the spring over and above the $1,000 spoken of in the lease, except the expenses necessary to run the spring; that he protested against the earnings of the spring being used for the improvement of the spring, but that defendant said that he thought the lease authorized him to do exactly what he had been doing, and that he, Hoeg, objected to all of the items in the statement marked C, save those for running expenses, as his understanding from Mr Palmer was that nothing but the current expenses should be deducted from the gross earnings.

The defendant, Harris, testifies that Aldrich, upon his return to New York, reported to him an arrangement which he thought of making with Mr. Palmer for the lease of Green Cove Springs and the property connected with it, provided he could get some one to join him who could furnish

the means to *fit it up* and put it in a *condition to be used,* and he solicited aid from him. It appears that in April, 1870, Mrs. Ferris visited the spring for some purpose. Defendant says that it was for the purpose of talking to the people who were objecting to the improvements and threatening to tear down the enclosures. There were also objections to cutting down the trees. This witness states that upon this visit Mrs. Ferris expressed herself satisfied, and that he has ever since publicly and notoriously expended his money upon the improvements of the spring property, and asserted his personal control over the same, advertising the spring in the public prints, partially in his own name, without exception, until the commencement of this suit, and has been on the property personally some months every year. His "action under the lease," he says, "has been to improve the spring, take care of it and provide for the public to bathe; that he cleared up the spring, fenced it in, cleared off the run-way dam to the river, spiled and planked in the spring, curbed and platformed it, excavated and sunk four timber bathing curbs for bathing pools, timbered and floored the bottom of them, constructed flumes for conducting water to each pool, built and sunk drains for pools to the river, built buildings for the keeper's office and for washing towels, constructed dressing-rooms in two continuous lines of one hundred and fifty feet, being seventy-five feet each, constructed flumes and waterways for taking in and letting out the water, enclosed all of the bathing pools, enclosed all the bathing pools with a high fence, and the entire spring grounds were enclosed with a picket fence. I expended several thousand dollars upon the spring, which I charged to the spring allowments. I ran the spring afterwards. The money arising from the spring was paid out for its care, expenses and improvements and the constant repair upon it. There has not been a dollar expended but to pay the expenses and

render the spring productive; *productive of profits for the parties interested in the lease.* I did not expend the proceeds of the spring to make it profitable to the hotel without regard to Mrs. Ferris and Palmer. I've been running the spring four seasons. I don't know the time we commenced having debts, without my books. People bathe in both summer and winter. The summer bathing is very limited, scarcely enough to pay expenses. *The proceeds of the spring have been greater than the actual running expenses for towels, fuel and servant hire; that is, the current daily expenses. The excess was expended in many repairs and alterations to accommodate the business. I could not tell how much the proceeds exceeded the actual running expenses.* No money has ever been paid to the lessors.

"Mr. Palmer and Mrs. Ferris owned considerable amount of unimportant property in the way of lots and blocks at that end of the village. On the property bought by me from Mrs. Ferris and Mr. Palmer I have erected substantial buildings and a good hotel, known as the Clarendon Hotel, and have expended considerable money on a wharf at that end of the village. The steamers were induced to land at it. The village has grown. The visiting population has increased. The building of the hotel has added three-fourths more to the patronage of the spring. I have expended all of the receipts of the spring, and more too, upon the spring.

"I never would have built a hotel, a store,a wharf,in fact, would not have been there myself, but for the existence of the spring. The spring adds, to some extent, to the attraction and profit of my house."

William Long says: "When Mr. Harris and Aldrich took charge of the spring I helped work around it considerable. There were no improvements on the spring at this time save a few small bath houses built by private parties. There

were two paths leading to the spring, one from the northern side and one from the southern. The spring was almost in a wild state. It remained in this condition until Mr. Aldrich and Harris took possession. They improved it very much. The town has been greatly improved by the houses built around and the general improvement of the spring." He states that lots worth before these improvements $50 are now worth $200; one of such lots he bought from Mrs. Ferris; and that some costing one hundred dollars in 1868 and '9 had been sold for one thousand. In a great measure the improvements and development of the spring have been the leading cause for the advance in real estate and the growth and progress of the place.

What has been said embraces a full statement of the case as it appears from the record, except that the particular matter of the exceptions is not stated. This we will state when each exception is considered.

We enquire what is the precise nature of this case, and what are the relative obligations of these parties.

Palmer and Ferris execute a lease for twenty years of this spring. The lessee agrees to put one thousand dollars in improvements upon this property. To this venture one is to contribute a lease, the other a specific sum, to be expended in improvements, and they are to share net profits. The lessee here admits his liability to account. and the differences here arise out of this accounting. It is clear that it was contemplated by the contract that the lessee was to have the management and control, and this he states was his view of the contract.

The lessee enters into possession, and for years does not pretend to give any account. When he does it is unsustained by a single voucher, and contains different charges for the same service. Not only is this true, but instead of confining himself to the one thousand dollars to be ex-

pended upon the property, he submits an account, accompanied by no voucher, claiming in a lumped entry four thousand six hundred and eighty-six dollars and thirty-nine cents "as expenditures." This expenditure, he states, he thought he was authorized to make under the contract, in the face of its express terms fixing the expenditure to one thousand dollars, and after six or seven years' use of the property, paying no portion of its earnings to his lessors. This account brings the property in debt to him in the sum of two thousand one hundred and eight dollars and sixty-eight cents. The lessors disclaim giving any authority for this expenditure, the administrator of one of them (Hoeg) stating that he protested against it, and the lessee shows no authority. There must be some method of accounting for this state of things. The master seems to be of the opinion that the spring was "ancillary" in some matters to the hotel interest of defendant, and we think that he made it so to the full extent that he thought it would serve him.

Take the hotel interest away and no one would think for a moment of running the property in debt, or of incurring expenses amounting to $2,000 over and above the receipts.

The defendant here is in possession of property as its manager under an obligation to share the net profits of its use and employment. His liability to account, and his duty in the matter of its management, is analagous to that of a partner in possession managing partnership property, or a tenant in common in possession under a contract to share profits. The relation is that of a peculiar agency founded in privity of contract. In all such cases as this, where a party is in possession under contract to use and employ property, and to divide net profits, it is his duty to keep precise accounts of all his transactions, and to have them always ready for inspection and examination. Story's Eq. Jur., §466; Story on Part., §181; 16 Fla., 99.

Simple honesty and fair dealing require this, and while the lessor has no right to participate in the management, he does have the right to a fair and full exhibit of receipts and expenditures.

The master says of the books of the defendant here that they have been kept in an awkward and unskillful manner, and that very little information can be "gleaned" from them. The defendant himself says that he cannot tell " how much the proceeds exceeded the actual running expenses."

This general review of the nature of this case, and the management of this property by the defendant, result in disclosing nothing to recommend him to favorable consideration.

We are asked to reverse the decree in this case because the exceptions of the defendant to the master's reports, original and supplemental, were overruled. None of the testimony taken upon the second reference to state this account is before the court. Under his first exception defendant insists that the allowance for taxes upon the spring is too small. In this, as in other matters, he presents, so far as we can see, not even an allusion to a distinct voucher for their payment.

The master bases his allowance first upon the testimony of defendant's partner, Applegate. From the average and proportions given by him with reference to the taxation upon the hotel, the spring and other property, (he having failed apparently to keep any account of the spring in this matter separate from the hotel) the assessment, the master states, would be $4,864, including the store-house. But the master, upon "*further investigation*," learns that the spring property "was assessed much lower at other times," and fixes three thousand dollars as a fair and equitable sum. In the evidence in this record (and we have inserted all of

it that has reference to the questions arising upon these exceptions) there is not a syllable to show what this "further investigation" was, and none of the testimony taken upon the second reference, which was made for the special purpose of restating the account marked exhibit C, so far as it concerns this item, is to be found. It is alleged that it is lost. The necessary presumption here is that this testimony justified the conclusion of the master. This evidence not being transcribed in the record, we are, in the language of the Supreme Court of the United States, "bound to presume everything in favor of the correctness of the decision of the court below, until the contrary appears." Upon this principle, unless the appellant here can show, in the absence of this testimony, "that no case could have existed, it being present," he cannot prevail. 1 Peters, 21, 22; 5 Gray, 423; 102 Mass., 480; 107 ib., 64; 117 ib., 403. To set aside a master's report upon a question of fact, a plain case of error and mistake must appear. 1 Stock., 309, 659; 14 Vermont, 514; 5 Gray, 423; 7 Cush., 222; 10 Pick., 398; 36 Maine, 115; 5 Ind., 422; 13 Allen, 326; 11 Ga., 570; 3 C. E. Green, 141; 8 C. E. Green, 83.

The next exception is because the receipts from the spring for four months, which the keeper was allowed to retain, were not deducted from the gross receipts of the spring. The answer to this is that from the estimate of the gross receipts which the master made in the absence of a full statement by the defendant in charge, the wages and price for board, as allowed by the master, were deducted from the gross receipts. We can see no plain error here.

The next exception is to the allowance for board of the keeper of the spring. The evidence, so far as we have it, shows that she was paid about eight dollars a month wages, and it is stated by the master that she eat at a separate table from the regular boarders. With all the

testimony before the master, his conclusion was that ten dollars a month was the sum at which good comfortable board for one of the station of the spring-keeper could be obtained at Green Cove Springs. In the absence of the testimony, we cannot presume his finding wrong.

The further exceptions are on account of too small allowance for advertising, as well as for expense for soap and towels, and for repairs on the spring. We cannot, in the absence of the testimony, say that these charges are wrong. The appellant himself admits that the lost testimony was "the principal testimony relied upon by both parties in the matter of the expenditures of the spring." We certainly cannot, in its absence, presume that the act of the master and of the chancellor was contrary to it.

The next exception is because he was not allowed something for keeping the books. The record does not show that such allowance was ever requested. Occupying the relation he did, he assumed, under his contract, the responsibility of making some entry of his transactions and of managing the property without a salary. His relation was like that of a managing partner. If he paid out anything on this account it does not appear, and therefore whether in case of such an expenditure it would have been a proper charge is not involved.

The first exception to the original report was because the master did not take the exact figures furnished in the testimony in estimating the receipts. This exception was allowed and the report was referred back for correction. The master then reported, stating that he predicated his average and estimates "upon the actual figures given in evidence." To this there is an exception on the ground that the master did not in this respect conform to the order of court. The court approved this last report, and in the

absence of the testimony we must presume the action of the court correct.

The master in this supplemental report, without any specific direction to that effect by the court, suggested that the charge of board for keeper for the entire year, as he had allowed, was a "clerical error," and should have been made for four months, at the rate of ten dollars per month. This charge the court allowed and decreed accordingly. This action is the subject of an exception, the ground being that it was "without authority." So far as the rate and the time allowed is concerned, there is no testimony here to show it is wrong; and we repeat what has been already said in reference to this subject. The only objection is that the charge was not authorized by the order of re-reference, the plaintiff having failed to perceive the error or to make any exception to the charge as originally made by the master.

The general rule is that a master in making a report must conform to the directions of the decree, and if he reports as to matters not referred to him, so far as it relates to that matter it is a nullity. 5 Fla., 478. While this is true, it is also true that the proper method to correct such an error is not to except, but "to apply to the court that it may be referred back to the master to review his report," thus giving the court the opportunity to do complete justice; and, if no such application is made, and the report should be confirmed, the court will pay no attention to it, except so far as it is warranted by the decree. Daniell Chy. Pldg. and Practice, §1296; 6 Simons, 605; 6 Paige, 127; 27 Vermont, 695; 9 C. E. Green, 25. This follows from the general rule that all proceedings subsequent to the decree must be consistent with it. If justice requires an alteration of the decree it must be reheard. The master

cannot correct the error by going beyond the decree in his report.

Here no such application was made to correct the report, and while it is beyond the matter involved in the second reference, it is clearly within the accounting directed by the decree, upon which all of the accounting is based. The defendant, having failed to make the proper application, and the matter being entirely within the scope of the original decree to account, and the action of the master having met the approbation of the chancellor, we think, upon an appeal, this should not be a ground of reversal. The defendant having failed to adopt the proper method for correction, if there was error or mistake, in the absence of any merit, so far as we can see in the objection, we think the decree should be affirmed.

The dercee is affirmed.

CATHERINE S. HART, AS EXECUTRIX AND IN HER OWN RIGHT, APPELLANT, VS. SANDERSON'S ADMINISTRATORS, APPELLEES.

1. Where there has been a final hearing, an appeal, a reversal of the decree and a remanding of the cause, as a general rule, an amendment to an answer by the addition of facts which, if they existed, must have been known at the time of the filing of the original answer, will not be allowed. Such an amendment should never be allowed in cases where the facts constituting the defence to be set up are not upon the showing made, rendered highly probable, if not certain, nor should it be permitted where (independent of defendant's conclusions) the *facts* desired to be added are not clearly material to the defence.
2. Upon hearing upon bill, plea and answer in support of the plea, every fact stated in the bill, and not denied by the plea or the answer in support thereof, must be taken as true, so also must the facts stated in the plea and answer be taken to be true.

3. The wife having joined in the execution of a mortgage deed with her husband, an acknowledgment by her made in the manner prescribed by statute, that she made herself a party to and executed the foregoing deed of mortgage "for the purpose of conveying and mortgaging all of my estate *in esse* and *in futuro* in the lands therein described," is sufficient to bar her dower interest.
4. The statute authorizing the private examination of the wife to bar dower is a substitute for the proceeding at common law to bar dower by fine and recovery. As against a mortgagee of the fee of the husband, which mortgage was accompanied by a relinquishment of the dower of the wife, an acknowledgment thus made cannot be impeached by her testimony alone. Such an acknowledgment may be impeached for fraud, but the proof to sustain such charge must be of the clearest, strongest and most convincing character.
5. While the rule is not universal that a power to sell includes a power to mortgage, yet a power to alienate a homestead in a prescribed manner involves the power to mortgage it in such manner. This power, existing both independent of and under the Constitution, a fair, consistent construction of the clause exempting the homestead from "forced sale," must exclude its application to a sale under a mortgage. A sale under a mortgage is not a forced sale within the meaning of the Constitution. The case of Patterson vs. Taylor and Randall, 15 Fla., 337, referred to and approved.
6. The wife having joined in the deed of mortgage of the husband conveying the homestead, and both parties in such deed having expressly waived all benefit of exemption and homestead, and stipulated that the land conveyed shall never be claimed to the prejudice of the grantees, she having also upon a separate examination acknowledged that she made herself a party to the deed for the purpose of conveying all of her estate *in esse* or *in futuro*, cannot, upon the death of her husband, either as heir-at-law or as executrix of his will, resist a sale under a decree based upon said mortgage upon the ground that it was a forced sale, or that the homestead had not been alienated with the joint consent of the husband and wife. Quere: Whether in case of a testate estate the widow as heir has in any case an equity to claim the benefit of a homestead exemption enjoyed by the husband?

Appeal from the Circuit Court for Duval county.

The facts are stated in the opinion.

D. C. Dawkins for Appellant.

John T. Walker for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is the second appeal in this case. Upon the former appeal the decree of the Circuit Court was reversed, and the case remanded for further proceedings.

A statement of the case then before the court will be seen by reference to 16 Fla., 267.

The cause being remanded, the plaintiffs, who are respondents here, set the cause down for hearing upon the bill and the plea and answer in support thereof, and the cause came on to be heard on the 14th of May, 1879. After argument of counsel the defendant asked leave to amend her answer. The court heard the motion and denied it. Afterwards, upon a hearing upon the bill, plea and answer in support thereof, the court held that the plea and answer set up no defence, and, after decree of reference to a master and proceedings before him, the relief prayed by the bill was decreed.

The first ground upon which a reversal of the decree is here sought is the refusal of the court to permit the amended answer to be filed.

The bill is to foreclose a mortgage of land, executed by husband and wife, in the execution of which both the husband and wife joined.

In the mortgage they "waived all benefit of exemption and homestead," and stipulated that the "same shall never be claimed to the prejudice of the grantees, their successors or assigns." In the separate and private examination of the wife she acknowledged that she "made herself a party to and executed the foregoing deed of mortgage for the purpose of conveying and mortgaging all of her estate *in esse* and *in futuro* in the lands therein described."

The original plea set up a claim of homestead. The answer in support of the plea admits the execution of the

mortgage; that it contained the covenants and stipulations mentioned; that the amount of money claimed as due was due, and that she executed the mortgage and signed the acknowledgment as stated. She denies, however, that she did it voluntarily, alleging that while no actual force or violence was employed, she had a well grounded apprehension and fear that unless she signed the acknowledgment the peace and happiness of her married relation with her husband would be materially disturbed, if not totally destroyed, and this she alleges was well known to her husband. The amended answer, leave to file which the defendant requested, alleges that the notary before whom her acknowledgment and relinquishment of dower was made knew at the time of his taking the same that defendant did not do so voluntarily, because defendant then and there said to him, in a tone of voice loud enough to be heard by him when interrogated, that she did not consent freely and voluntarily to sign away her right of dower, but that she would sign the paper because her husband wished her to do so. Of these facts defendant charged that plaintiff had notice, because, as she says, the said notary, being also an attorney-at-law, seemed to be representing the complainants, and the note and mortgage sought to be foreclosed are in the hand-writing of the notary, or so much thereof as is written and not printed.

What are the circumstances under which this amended answer is sought to be filed?

It is after a final decree, appeal therefrom, reversal of the decree, a remanding of the cause for hearing upon the plea and answer originally filed, after the cause being set down for hearing, and after the expiration of nearly four years from the filing of the original answer.

No reason is given for this delay, and no averment is made that all the facts set forth in the proposed amended

answer were not known to the defendant when the original answer was filed and the facts sought to be placed in the amended answer are such as must have existed and been known when the original answer was filed.

The application here made was addressed to the discretion of the court, for according to no known rule of practice controlling the subject did the defendant have a right to amend at this stage of the proceedings and under the circumstances stated. The general rule is that an amendment to a sworn answer by the addition of material facts known to the defendant at the time the original answer was sworn to, will not be permitted on a final hearing, (23 N. J. Eq., 498; 1 Daniell Chy. Prac., 778, 780,) and certainly the rule must apply to this case where there had been a final hearing, an appeal, a reversal of the decree, and a remanding of the case.

In Smith vs. Babcock, 3 Sum., 585, Mr. Justice Story said: "It seems to me that before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probably, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence, and that the mistakes have been ascertained and the new facts have come to the knowledge of the party since the original answer was put in and sworn to."

In this case we do not see that the amended answer sets up such facts as are material to the defence. In other words, what is proposed to be set up by way of amended answer does not constitute a good defence. The original answer sets up that while she executed the deed and the acknowledgment that its execution was her voluntary act, still she did not thus act voluntarily, but

that she did so to preserve the peace and happiness of her married relation, and that her husband knew this. The amended answer alleges that the notary-public taking the acknowledgment knew that defendant did not do so voluntarily because she so declared to him, and because the notary seemed to represent complainants. There is nothing accompanying the amended answer to show that there is any evidence of this fact, except the statement of the defendant, and the only fact which the defendant gives as the basis of her opinion that the notary represented the complainants is that the note and mortgage were, so far as they were in writing, in the hand-writing of the notary. Even admitting the truth of this last allegation, we do not see how this renders her acknowledgment in any manner defective. It is customary for the notary to draw the acknowledgment, and we cannot see how this filling up the blanks in a printed deed vitiates the deed, or how this renders him counsel for either party, nor do we see that her acknowledgment of the voluntary execution of an instrument made in the terms of the law is to be overcome by her subsequent simple denial of its proper execution, when her contract is sought to be enforced against her. Looking to this pleading, that is all that the amended answer proposes to allege in these respects.

In the case of Kerr vs. Russell, 69 Ill., 670, Mr. Justice Breese, speaking for the court, said: "The unsupported testimony of a party to a deed that he did not execute it shall not prevail over the official certificate of the officer taking the acknowledgment. Public policy, the security of titles, the peace of society, demand such a rule and a strict adherence to it. This court has often said that the provision of the law authorizing a Justice of the Peace, or other designated officer, to take the private examination of the wife was designed as a substitute for the proceedings at

common law by fine and recovery, whereby the rights of the wife on the one hand might be guarded, and a sure, indefeasible and unquestionable transfer of her right secured on the other. It cannot be supposed, whilst the Legislature were protecting the wife, they had no regard to the importance of inspiring confidence in the title. * * No man could be content with a title in all respects perfect upon its face, when, upon the death of its vendor, his widow, with the assistance of the magistrate, or without it, as in this case, may undo what they have solemnly done, and without the possibility of contradiction, since the magistrate and the wife are alone privies and parties to her examination. Of what value would privy examination be where the wife has been quite during the life-time of her husband, and conjures up at a remote day objections which are allowed to prevail? Who would take a deed to which a married woman is a party with these probable direful results staring him in the face? Everything in relation to title would be thrown into utter confusion, and irretrievable mischief would be the certain consequence." The court then say that such an acknowledgment, like a fine and recovery at common law, for which the acknowledgment is substituted by statute, might be impeached for fraud, but "the proof to sustain such charge is required to be of the clearest, strongest and most convincing character by disinterested witnesses."

In the case of the Singer Manufacturing Company vs. Rook, *et ux*, 84 Pen. State, 442,the Supreme Court of Pennsylvania state the law to be that "where a married woman joins her husband in a mortgage to encumber her separate estate as to a *bona fide* mortgagee for value, without notice of fraud or imposition in the procurement of the execution of such instrument, the certificate of the magistrate who takes the acknowledgment is conclusive of every material

fact expressed therein. This certificate of the officer is a judicial act, and cannot be impeached except for fraud." See also 53 Miss., 331; 107 Mass., 324; 1 Har. and McH., 211; 11 Ohio State, 202; 6 Texas, 208. While this is not the case of a transfer of separate estate, still the principle as to the acknowledgment of the deed is entirely applicable.

Accepting the law as thus stated, this proposed amended answer set up no meritorious defence, and for this alone the court could have properly refused permission to file it.

The only other action of the court which the record presents for our consideration is the final decree made upon the bill, the plea and answer in support of the plea. The appellant here discusses the case as though it were the case of a hearing upon bill and answer. The hearing was had upon bill, plea and answer in support of the plea. The rule in such hearings is that every fact stated in the bill, and not denied by the averments in the plea, or by the answer in support of the plea, must be taken as true. Hart's Extrx. vs. Sanderson's Admrs., 16 Fla., 267, and cases there cited. This is the rule as to facts stated in the bill and not denied by the plea or answer, and as to the facts stated in the plea and answer, they must be taken to be true as pleaded.

Now, neither the plea nor the answer in this case denies the execution of the mortgage of the acknowledgment by defendant. The result of this is that such execution is admitted. Indeed, the defendant admits such execution expressly. Not only is this true, but (except as to the allegation that the money, to secure which the mortgage was given, was expended upon the mortgaged premises, which is denied,) the case as stated by the bill, that is the facts set up and properly pleaded, are admitted by the plea and answer; the plea and answer proposing to set up matter constituting a sufficient reason why the plaintiff should not

have the relief he prays notwithstanding the truth of his bill, except in the particulars mentioned. Daniell Chy. Pldg. and Prac., 605; 2 Paige, 177; 3 ib., 222; 4 ib., 364.

Now, the plea here sets up that the mortgaged premises were the homestead of the mortgagor; that the defendant was the wife of the mortgagor; that he was dead; that she has an interest as his heir-at-law, and that she was the executrix of his will; that said premises have been occupied as a homestead since his death, and that no part of the money borrowed was used in the purchase of or to improve the premises. The answer in support of this plea, while admitting the execution of the mortgage deed and acknowledgment, makes the same denial as to the use of the moneys, and she affirms therein that her action in the matter of the execution of the mortgage and acknowledgment was not free and voluntary, but that while no actual force was employed she had a well-grounded apprehension and fear that unless she signed the same the peace and happiness of her marriage relation with her husband would be materially disturbed, and that this, her apprehension, was known to her husband.

We have already seen that what is here alleged as to an acknowledgment and relinquishment of dower upon examination, as required by the statute, constitutes no defence where there is such a relinquishment as conforms to the statute.

Is there such a relinquishment here ?

This question is not expressly raised by the plea and answer, nor is there any cross-bill; still it arises upon the face of the bill, and exhibits thereto. But however this may be in view of the conclusion we reach, neither the defendant nor plaintiff can well complain, as the defendant argues the question generally; and the plaintiff cannot well do so, the conclusion of the court being in his favor. The mort-

gage deed executed by the wife contains a covenant of warranty against all persons, and is accompanied by an ac-acknowledgment, made separate and apart from her hus- that she made herself "a party to and executed the foregoing deed of mortgage for the purpose of conveying and mortgaging all of my (her) estate *in esse* and *in futuro* in the lands therein described." The covenants are perhaps inoperative as to the wife.

The statute does not require that the terms "relinquishment of dower" shall be contained in the deed which is signed, or the acknowledgment which is made, in order that a good and sufficient relinquishment of dower may be made. The statute provides that dower may be extinguished by the wife making herself a party to the deed for the purpose of relinquishing the same, accompanied by an acknowledgment, made separate and apart from her husband, that the relinquishment and renunciation of dower is made freely, &c.

In this case the wife makes herself a party to the deed, signs it, and acknowledges, upon an examination made under the statute, that she executed the deed "for the purpose of conveying and mortgaging all of my (her) estate *in esse* and *in futuro* in the lands therein described."

The Supreme Court of the United States, 5 Wall., 807, states the rule in reference to the private examination of a *feme covert* to be that equivalent words, or words which convey the same meaning, may be used instead of those to be found in the statute. See also 3 Ohio, 153. This is in reference to the words used as descriptive of the manner of making the acknowledgment, but we see no good reason for the application of a different or other rule when the extent and nature of the estate conveyed is considered, and certainly in this case the wife must have known that she intended to part with all her interest when she says that

her purpose was to convey and mortgage all of her estate *in esse* and *in futuro*, all her estate then existing or to exist. In the case of Hartley vs. Ferrell, 9 Fla., 381, this court held an acknowledgment of a relinquishment of dower effective as an acknowledgment applicable to the separate estate of the wife. The court in that case say: "The execution of this acknowledgment was manifestly intended to convey some interest in the premises, or it was made in pursuance of a premeditated fraud. Mrs. Sellers had no dower interest; her only interest was in the fee. If the fee was not intended to be conveyed, then no interest was passed to the grantee, and the whole transaction bears the impress of an unmitigated attempt at fraud." We have very considerable doubt of the correctness of this decision. 6 McLean, 206, and cases there cited. It certainly goes very far to sustain titles. This is and should be the inclination of courts at all times. Our conclusion here is that it was not absolutely necessary to use the word dower in this acknowlment; that it is sufficient to use words embracing such an interest of the wife, and that with such an acknowledgment it is not necessary for the wife to state in the joint deed that she signed it for the purpose of relinquishing her dower interest. The statute provides that her dower may be extinguished by "making herself a party to the conveyance" with such purpose. Here she has made herself such a party, and by her acknowledgment, taken as the statute requires, she states her purpose to have been to convey all of her interest in the land. 13 Ark., 423. To hold under our statute, as has been held in some of the States under their statutes, that the deed itself must contain express words conveying the dower interest, would be to add to the requirements of our statute. This we are certainly not disposed to do. The Legislature has not prescribed a form of acknowledgment that is to be *literally* pursued, and a substan-

tial compliance with its requirements is all that is necessary. To require a literal adherence to the express words of the statute as essential to the validity of acknowledgments would be attended with destructive consequences.

The only other remaining questions in this case are whether, after the express waiver of all right of homestead by the husband and wife, and their joint deed of mortgage, a sale under a decree in equity is a "*forced sale*," and whether there has been an alienation of this real estate by the joint consent of the husband and wife, within the meaning of the Constitution.

The first question, we think, has in principle been settled by this court in the case of Patterson vs. Taylor and Randall, 15 Fla., 337. A sale under a mortgage of personal property was there held not to be a *forced sale* within the meaning of the Constitution. In this case we have not simply a mortgage, as in that case, but we have each of these parties, husband and wife, expressly waiving in their deed "all benefit of exemption and homestead," and a stipulation "that the same" (the land) "shall never be claimed to the prejudice of the grantees." Certainly, when they thus expressly contract, a court of equity will not assist them in interposing an obstacle to the recovery of this money.

An individual cannot be said to have been compelled to do an act when it is the result of his own express agreement. The view, as expressed by this court, is that a sale resulting from contract, a mortgage in the case referred to, while it may be a sale under process of law, is not a *forced sale* within the meaning of the Constitution, and that without any express waiver of homestead exemption in that case. That view, we think, is correct. The framers of the Constitution, we think, never intended to restrict the right of the owner of property to an absolute and clear sale of his in-

terest therein. As against general debts made without reference to homestead liens as a security, a sale had after judgment thereon involves no element of consent, but when a sale is the result of a contract, involving consent to sell as to a particular piece of property, according to all fair, honorable and just dealing, it cannot be said to be "*forced.*" Cases involving the greatest wrong and injustice might result from a contrary view. A husband and wife to-day execute a mortgage on the homestead expressly waiving all right of exemption. To-morrow the husband dies; the money is distributed to those entitled; the exemption accrues to the heir; the creditor loses his money, and the property is no security, although expressly made so by contract and consent.

We think, for the reasons stated, that the sale here decreed is not a forced sale. Has there been such consent to an alienation as the Constitution contemplates? To this mortgage the wife has made herself a party; she has therefore consented to it. There is nothing in the Constitution or the statutes requiring any separate examination of the wife in orded to evidence such consent. She has, by virtue of her power to refuse assent to an alienation, no estate in the land, (46 Wis., 683;) and this assent is certainly shown by her joining in the deed. She has, under her hand and seal, solemnly given her consent jointly with her husband, and this is sufficient.

It remains to consider the effect and purpose of the word "alienable," as used in the Constitution in the connection in which it is found. The provision is that the "real estate" (meaning real estate constituting the homestead) "shall not be alienable without the joint consent of husband and wife." It follows the exemption from "forced sale."

This provision is simply a restriction upon an admitted

power otherwise to sell or encumber. If the Constitution did not contemplate a power in the head of the family to sell in the absence of a restriction, a restriction would be unnecessary and useless, and the restriction here applies to the power to mortgage only because it is an alienation within the meaning of the Constitution. While the rule is not universal that a power to sell includes a power to mortgage, yet wherever there is a power to alienate the homestead in a prescribed manner, the courts have held that such power included the power to mortgage. 6 Texas, 114; 4 Nev., 383; 2 Gray, 385. While there is an admitted difference in the views of the courts as to what constitutes a "*forced sale*," I can find no case which holds that a power to alienate in a prescribed method does not embrace the power to mortgage. Thomp. on Hom., §456.

In conclusion we will remark that the Constitution having expressly contemplated the power to mortgage according to a fair construction of the power to "*alienate*," the terms "*forced sale*," which, to say the least, are indefinite and uncertain, should be controlled to some extent by the obvious meaning of the other portion of this clause. To construe the Constitution so as to confer or admit a power to mortgage, and at the same time prohibit a sale under a decree to sell under such mortgage, cannot be sanctioned by any proper rule of construction. Such a construction is absurd. One or the other of these propositions is wrong, and there is less doubt that the term alienable confers or admits a power to mortgage than there is that the terms "forced sale" should be restricted to sales involving no assent by contract, referable to the special property to be sold.

We have discussed the question of homestead exemption in the light of the argument and of the pleadings in this case. We do not, however, see clearly how the widow, where there is a will, either as widow or executrix, in view

of the provisions of section 3, Art. 9, of the Constitution, has an equity by virtue of an exemption which accrues to *the heir* of the party having enjoyed such exemption, such party being the deceased husband.

The decree is affirmed.

CALEB W. GORTON ET UX., APPELLANTS, VS. SAMUEL PAINE ET. ALS., APPELLEES.

1. After sale under foreclosure proceedings, a court of equity has power co-extensive with its jurisdiction over the subject-matter, to award orders directing a party in possession to surrender to the purchaser.
2. As a general rule, such an order will follow in cases where the party in possession was a defendant to the suit. Where, however, the person in possession is a mere stranger, who entered into possession before the suit was begun, he cannot be dispossessed by an execution on the decree.
3. Where the subject-matter of a suit arises primarily from the relations of first and second mortgagee, with reference to the mortgaged premises, the matter is one peculiarly the subject of equitable cognizance. If the second mortgagee in possession is a party to a foreclosure suit, and he claims under a tax title from the State obtained by him while he was the owner of the right and equity of the mortgagor, the purchaser under the foreclosure proceedings is not remitted to a court of law to recover possession of him.
4. An answer to a rule to show cause why a writ of possession should not be awarded against a defendant to a suit, should set up the facts constituting his defence in such manner that they may be understood by the other party who is to answer them, and by the court giving judgment. A second mortgagee who was a party to a foreclosure suit by the first mortgagee, answers to a rule to show cause why the purchaser should not be awarded possession as against him that he holds by a title derived from the State of Florida. This is not sufficiently certain, as it is possible that as the

holder of one character of deed from the State he might hold by a paramount title which would put the purchaser to his action at law; while if he is the holder of a tax title acquired while he was a second mortgagee, the court of equity has jurisdiction.

Appeal from the Circuit Court for Duval county.

The facts in the case are stated in the opinion.

H. A. Pattison for Appellants.

J. W. Archibald for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The appellants filed their bill in the Circuit Court of the State of Florida, for the Fourth Judicial Circuit, in Duval county, to foreclose a mortgage executed by Paine and wife, the defendant, Sarah A. Day, in possession under foreclosure proceedings before that time had, as a second and prior mortgagee, being made a defendant. This is a case made by the bill. After the entry of an order taking the bill as confessed, the defendant, Sarah A. Day, set up by way of answer that she was the owner of the real estate upon which plaintiffs sought to foreclose their mortgage by virtue of a deed executed by the Clerk of the Circuit Court of Duval county, (deed dated January 13, 1879,) issued upon a certificate purchased by her from the Comptroller of the State of Florida for the unpaid State and county taxes assessed against said premises for the year A. D. 1874. Exceptions were taken to this answer. The exceptions were sustained and the defendant's attorney filed another answer setting up substantially the same facts as that contained in the first answer, except that she asserted that she held her possession under this deed as a title paramount and superior to that of the plaintiffs, the first mortgagees. This answer was struck from the files. Upon the report of a mas-

ter there was a final decree of foreclosure and sale. In the meantime defendant, Day, had asked to be dismissed as a defendant to the suit, and such request was denied. There was a sale had under the decree, the plaintiffs becoming the purchasers. A deed to the premises was executed to them, the sale by the master having been confirmed.

Upon motion of plaintiffs, and by consent of defendant, Sarah A. Day, a rule upon the defendant, Sarah A. Day, to show cause why a writ of possession should not issue against her, and requiring her to show under what right she claimed to hold possession of the premises, was issued. To this rule Sarah A. Day answered that "she is the owner of the premises sold under the decree granted in this cause by a deed from the State of Florida, made and executed and delivered to her; that she claims title to said premises by a title paramount to the title obtained by said Olive P. Gorton under said decree, and that said title is adverse to both the mortgagor and mortgagees in said cause; that she is in possession of said premises lawfully obtained, and that she claims the right to hold possession of the same as the owner under the deed aforesaid."

The court pronounced the answer sufficient and discharged the rule.

The plaintiffs appeal from this order. It is thus seen that neither party appeals from the final decree in the foreclosure suit, and the proceedings therein cannot be reversed or affirmed for any error therein, if there be such error, as to which we say nothing.

The simple question presented is, whether the answer to the rule was sufficient.

This leads us to enquire when a writ of possession will be granted. After such proceedings as were had in this foreclosure suit, there is no question of the power of a court of equity in a proper case to award an order directing the

party in possession to surrender to the purchaser, and such an order as a general rule will follow in cases where the party in possession was a party defendant to the suit. But if the person in possession was not a party to the suit, and is a mere stranger who entered into possession before the suit was begun, he cannot be turned out of possession by an execution on the decree.

Chancellor Kent says of this power of a court of equity in such suits as this (4 John. Chy., 609,) that the power to apply the remedy is co-extensive with the jurisdiction over the subject-matter. The subject-matter here arises primarily from the equitable relations of a first and second mortgagee with reference to the mortgaged premises, and it is hardly necessary to say that these relations are peculiarly the subject of equitable cognizance. While the general rule in cases where the party in possession is a defendant to the suit is as stated, and while the relations as disclosed by the bill are the subjects of equity jurisdiction, yet if a person in possession shows a right paramount to the mortgage the court will not attempt to decide any question of legal title, and the possession must then be sought for by proceedings at law. In this view of the law, as we conceive it to be, the question is, does this answer to the rule show a right paramount to the mortgage. The answer sets up a title acquired from the State of Florida, which the defendant alleges is paramount to the mortgage. It gives no date of the deed. When she acquired this title, whether during the time she was a second mortgagee out of possession, or when she was in possession after her foreclosure suit, or whether it was before the existence of the first mortgage, or whether the title she acquired was a tax title, or a deed from the State to lands in which the State had a proprietary interest, is not stated. The principle and general rule as to the statement of facts in pleadings of this character

is that they must be set forth with certainty, by which is meant a clear and distinct statement of the facts which constitute the ground of defence, so that they may be understood by the party who is to answer them, and by the court who is to give judgment. Now the law is unquestionably that a second mortgagee cannot set up a tax title as against a prior mortgagee. 20 Wis., 350; 21 Wis., 262; 40 Iowa, 209; 33 Iowa, 254; 38 Iowa, 550; Jones on Mortgages, 680. The rule upon this subject, as announced by the Supreme Court of Iowa, is that as between a first and second mortgagee of land equity regards the land as a common fund for the payment of both liens, and that it is an act of fraud for a second mortgagee to thus acquire by tax sale a title to the land, and use it to destroy the claim of the prior mortgagee. The second mortgagee in this suit was the holder of the equity of the mortgagor, and stood in his place. Neither the mortgagor nor the second mortgagee, who had the mortgagor's right and equity, could, by tax deed, thus acquire an absolute title as against the prior mortgagee.

In this view of the law upon the subject, it is clear that the answer to this rule did not set up the facts with sufficient certainty for any one to determine the precise nature of defendant's claim. The Circuit Court should have pronounced the answer insufficient for want of certainty, with leave to make such amendments as would enable the court and the other party to understand what title the defendant relied upon.

The order discharging the rule is set aside, and the case is remanded for further proceedings consistent with this opinion.

JOSEPH RIVAS AND HENRY KOOPMAN, APPELLANTS, VS. ANTONIO SOLARY, APPELLEE.

1. Under the provisions of the act of December 27th, 1856, entitled "An act to benefit Commerce," all the title of the State to the submerged land extending from the low water mark to the channel of the river was vested in the then riparian proprietor, and such proprietor had the right, subject to the conditions of the law, to convey that portion of the submerged land which extended from low water mark to the channel.
2. Where the metes and bounds of a deed executed by such riparian proprietor do not extend to the channel, but are fixed without reference to the river as a boundary, the grantor retaining possession of structures upon the submerged land, and the grantee understanding that he got no title thereto, the title to the submerged land remains in the original riparian proprietor, and can be made the subject of a grant by him.
3. Land does not pass under a deed as an appurtenance to land.

Appeal from the Circuit Court for Duval county.

The General Assembly of Florida passed the following act, which was approved by the Governor December 27th, 1856, entitled "An act to benefit Commerce:"

"WHEREAS, It is for the benefit of commerce that wharves be built and ware-houses erected for facilitating the landing and storage of goods; *and, whereas*, The State being the proprietor of all submerged lands and water privileges within its boundaries, which prevents the riparian owners from improving the water lots; thaerefore,

"SECTION 1. *Be it enacted by the Senate and House of Representaves of the State of Florida in General Assembly convened*, That the State of Florida, for the considerations above mentioned, divest themselves of all right, title and interest to all lands covered by water lying in front of any tract of land owned by a citizen of the United States, or by the United States, for public purposes, lying upon any naviga-

ble stream, or bay of the sea, or harbor, as far as to the edge of the channel, and hereby vest the full title in the same in and unto the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of Commerce; and upon lands so filled in to erect ware-houses or other buildings, and also the right to prevent encroachments of any other person upon all such submerged land in the direction of their lines continued to the channel, by bill in chancery or at law, and to have and maintain action of trespass in any court of competent jurisdiction in the State for any interference with such property: also confirming to the riparian proprietors all improvements which may have heretofore been made upon submerged lands for the purposes within mentioned.

"SEC. 2. *Be it further enacted*, That nothing in this act contained shall be so construed as to release the title of the State of Florida, or any of its grantees, to any of the swamp or overflowed lands within the limits of the same; but the grant herein contained shall be limited to those persons and body corporate owning lands actually bounded by and extending to low water mark on such navigable streams, bays and harbors." (689-90, McC.'s Dig.)

The other facts are stated in the opinion.

John T. Walker for Appellants.

J. M. and *H. J. Baker* for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The subject of this suit is a part of water lot number nineteen, on the St. Johns river, in the City of Jacksonville.

Rivas and Koopman, plaintiffs in the Circuit Court, claim that the boundaries of their land when purchased extended to the St. Johns river at low water mark; that they are riparian proprietors, entitled to the benefits and rights extended to such owners by virtue of the act entitled "An act to benefit Commerce," approved December 27th, A. D. 1856; that by this act the State of Florida ceded to riparian proprietors all the right, title and interest of the State to all lands coverd by water, lying upon any navigable stream, as far as the edge of the channel, authorizing them to erect wharves and to fill in from the shore or bank as far as might be desired, not obstructing the channel of the river, and leaving sufficient space for the purposes of commerce; that they have constructed on said lot a fine building, and are prevented from the use of the water front by defendant, Solary, who claims to be entitled to its use as against them; and that he, Solary, claims the right to keep up a wharf across their water front. Plaintiffs allege a desire to build suitable wharves upon the property. They pray for an injunction prohibiting defendant from selling any portion of the water front, and for an order restraining him from interfering with plaintiffs' possession, or preventing them from exercising control over their property.

To plaintiffs' bills, setting up substantially the facts recited, defendant answers, claiming ownership of the water front and denying any right of plaintiffs to its use. After the usual proceedings, and the taking of testimony, the injunction was dissolved and the bill dismissed upon the hearing.

From this order of dismissal this appeal is taken, the ground of appeal being error in granting this order.

The facts as disclosed by the record are, that Samuel N. Williams, the party through whom both plaintiffs and defendant trace title, acquired lot number nineteen anterior to

any of the conveyances proceeding from him, and that he had all the interest which followed from the act of 1856, which was all the right, title and interest of the State to the land covered by the water lying in front of his lot, subject to the trust that it was to be used for the purposes of commerce, as stated in the statute. It further appears that said Williams constructed a wharf across said lot before he executed any of the deeds through which plaintiffs claim, and that he remained in possession of the wharf, claiming title, up to the time of his sale of it and the land beneath it to defendant, Solary; that plaintiffs claim through two deeds of Williams—one to Andre Porson and the other to Margaret Wightman, the first being dated the 15th of June, A. D. 1867, and the last April 5th, A. D. 1871.

Neither of these deeds to the grantors of plaintiffs describe the river as a boundary. The land conveyed is named by feet, by fixed metes and bounds, "with the appurtenances;" and the testimony shows that this is all that plaintiffs understood they acquired. As to the south boundary of the land conveyed to Mrs. Wightman, the evidence is that at high tide the water stood over it a foot and a half deep; but the witness is not positive that the south end extended to the water at low tide. The south boundary of the land conveyed to Porson extended to low water mark. This is the evidence as to plaintiffs' title.

Defendant claims through a deed of Samuel N. Williams, dated March 2d, 1871, which in terms conveys the land to the channel of the St. Johns river. It appears from the record that at the time Solary purchased a large part of lot number nineteen had been filled up, and that there is now about thirty feet between the south line of the land granted to plaintiffs and the wharf in possession of defendant.

The question thus presented is, who has the better right to this wharf and to the submerged land beneath it.

We are unable to see upon what principle we can extend the operation of the deeds to plaintiffs beyond the land conveyed and embraced in the boundaries described therein. S. N. Williams, through whom each of these parties claim, it is admitted, had under the act of 1856 all the right and title of the State in the submerged land to the channel of the river.

This title was attended with no other restrictions than those contained in the act, and there is nothing in the act prohibiting his transfer of the property, subject to the same conditions under which he held it. It is not questioned that the title to these lands was in the State. What was here granted by the State was in terms something more than the ordinary right which the proprietor of lands on a navigable stream had to its use, and the right to use, for commercial purposes, after the act, was an incident to the ownership of the land, which the State gave to the riparian proprietor.

Williams, at the date of the act, was the riparian proprietor, and thus became vested with the title, as stated. Anterior to this act, as riparian proprietor, his title did not extend beyond high water mark; after this act it extended to the channel. The act, in its terms, vests the full title in him who owns lands actually bounded by and extending to low water mark, and we can see no ground for holding that is was to be simply appurtenant to the adjacent lands. The statute is too plain to admit of doubt or construction.

The State had the absolute proprietary interest in the land, and could grant it to the then riparian owner. 3 Kent, 427; 6 Mass., 436. Plaintiffs contend that the right to build a wharf passed as appurtenant to the land granted to them. This cannot be so, because the estate of Williams in the land to the channel, through whom they derive, was

an estate in the land, and the right to build wharves was an incident to that proprietorship.

The deeds of plaintiffs did not include this land, and land does not pass as appurtenant to land. 10 Pet., 54.

We say nothing as to the propriety of the remedy sought in this case.

The order and decree denying the injunction and dismissing the bill is affirmed.

JOSEPH FINEGAN, APPELLANT, VS. THE MAYOR AND ALDERMEN OF THE CITY OF FERNANDINA, APPELLEES.

A Court of Equity has no jurisdiction to enjoin proceedings on a mandamus, where the parties seeking redress by such proceedings are not the plaintiffs in equity.

Appeal from the Circuit Court for Nassau county.

The facts are sufficiently stated in the opinion.

Fleming & Daniel for Appellant.

R. M. Smith for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

It appears from the bill in this case that in 1860 a bond was given by one Thomas D. Hawkins, as mayor of the city of Fernandina, Florida, to Joseph Finegan, which bond purported to obligate the city to pay Finegan, at certain times and before the 4th day of October, 1863, $3,300, which bond recited that the same was for the purchase of certain lots of land for the city.

It further appears that no money was ever paid upon said bond, and that no suit at law was ever commenced

thereon, but that on the 13th day of November, 1866, said Finegan, as relator, filed a petition in the Suwannee Circuit Court for Nassau county, Florida, for a mandamus to compel said city to pay said bond; that on the 13th day of November, 1866, the court issued an alternative writ of mandamus as prayed for by said petitioner; that on the 26th of November, 1866, the parties, upon whom said writ was served, filed an answer thereto, denying any indebtedness to said Finegan, and all the material allegations of said petition; that on the 31st of December, 1866, the Clerk of the Court issued a peremptory mandamus to the said parties to levy a tax to pay the said sum of money.

It further appears that said writ has never been enforced, though several attempts have been made by the relator to procure the enforcement of the same, up to the spring term, 1873, from which time, for five years, and up to the spring term, 1878, the said writ was allowed to sleep.

The bill further alleges that no formal judgment was ever entered up against respondents in said mandamus proceeding.

On January 24, 1879, respondents filed a bill, to which they filed an amendment on April 7, 1879, the prayer of which amended bill was for an injunction to restrain the enforcement of said writ issued in 1866, which prayer read as follows, to-wit:

"To grant unto your orators a writ of injunction, to be directed unto the said Joseph Finegan, his attorneys, solicitors, officers or agents, perpetually enjoining each and all of said persons from any further action or proceeding to enforce the said writ of mandamus issued on the 31st of December, 1866, upon the petition of said Joseph Finegan, against the said city of Fernandina; and that your Honor will vacate or set aside and dismiss the said peremptory

writ of mandamus of December 31, 1866, and decree the same null and void."

The other allegations of said bill were briefly and in substance:

1. That at the time of the issuance of said peremptory writ of mandamus, December 31, 1866, there was no legal organization of any city government known as the city of Fernandina; that the organization that then existed was not made in accordance with any charter or law of the State, but was a temporary organization of the people for temporary protection, and could not be made responsible for liabilities that may have been incurred by some other government.

2. That said bond was fraudulently issued in that the same was issued without authority of law and without any consideration.

3. That appellant never gave in return for said bond his bond, or any other binding obligation, or any consideration of any kind.

4. That if said bond was for the purchase-money of certain lots, said Finegan, at the time of the filing his petition for said mandamus, could not have given the said city any title to or possession of said lots.

5. That the claim of said Finegan upon said bond was a disputed and unadjudicated claim.

6. That no judgment at law had ever been obtained upon said bond.

7. That said writ was obtained in an irregular and fraudulent manner in that at the time of the issuance of said alternative writ no petition or bill was on file in court asking or praying for the same, and that said peremptory writ was issued without any order of any Judge or competent officer of any court.

8. That the court was acting without authority or jurisdiction.

And that prior to the issuance of said writ no trial by jury, or by reference, or by the court, or in any manner, was ever had to determine the facts alleged in the said petition praying for the said writ of mandamus. And that the said City of Fernandina, though filing an answer denying any indebtedness to the said Finegan, was never afforded any opportunity, in any manner, to defend itself against the issuance of said peremptory writ; and, in fact, never had any day in court.

To the said bill appellants demurred, which demurrer was overruled; and after due notice, motion was made for an injunction, based upon the allegations of the bill and exhibits thereto, which motion, after argument by counsel for both parties, was granted by the court allowing a temporary injunction, after which appellant filed an answer to said bill denying the material allegations thereof, and moved the court upon said bill and answer to dissolve the said injunction, which motion was denied, from which order, and the order overruling the said demurrer, this appeal has been taken.

"Fraud, accident, mistake and discovery are four of the principal grounds upon which injunctions may be applied for to stay proceedings at law, and it is to be observed that an injunction to restrain proceedings at law, when awarded, does not deny but admits the jurisdiction of the courts of the common law; and the ground upon which it issues is that they are making use of their jurisdiction contrary to equity and good conscience." 2 Daniell's Ch. Pl. and Pr., 5 Am. Ed., 1624.

We may remark, upon a careful examination of this case, that every alleged defence against the bond referred to was available in the mandamus proceedings, including the ques-

tion of jurisdiction, and every irregularity and every erroneous ruling of the court were remediable at law. The laches of the complainants in neglecting to avail themselves of the adequate legal remedies at their disposal, give them no standing in a court of equity. 12 Fla., 185.

Daniell, in the same book above quoted, p. 1620, says: "The court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, an indictment, an information, or a writ of prohibition; but this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in equity."

This court, in County Commissioners vs. Bryson, 13 Fla., 281-5, had occasion to cite the same authority upon this question. As the plaintiffs in equity were not the plaintiffs or relators in the mandamus proceedings, the restriction of the equity jurisdiction must apply in the present case, and is conclusive against the complainants.

The decrees overruling the demurrer and granting the injunction, and denying the motion to dissolve, are reversed and the cause remanded, with directions to dismiss the bill.

WILLIAM P. MARVIN, SURVIVING PARTNER, APPELLANT, VS. GEORGE W. HAMPTON AND WIFE, APPELLEES.

1. Where the proofs offered by a plaintiff in support of his case leave the matter in such doubt and uncertainty that it is impossible for the court to do justice or make any specific decree, the bill should be dismissed.

2. Where before final hearing a suit is dismissed as to a defendant in the absence of a transcript of the record in which the order is made, or of any positive evidence of the ground of the order, the court cannot presume in a collateral suit that the judgment subsequently rendered against the other defendant was binding upon the

defendant as to whom it was dismissed, or that the order dismissing the suit was an adjudication in favor of the defendant.

3. A defendant, relying upon the defence that the same matter was in issue and determined in a former suit, should set forth so much of the former proceeding as will show that the same point was then in issue and determined, and should aver that the allegations as to the title to relief were substantially the same in the second bill as in the first.
4. A decree in a suit to which a person was not a party does not bind him.

Appeal from the Circuit Court for Leon county, to which the case was transferred.

This is a suit in equity brought in Madison county by George W. Hampton and his wife, Susan A. E. Hampton, against William P. Marvin, surving partner of the firm of J. M. & W. P. Marvin. They allege that on the 5th of February, A. D. 1872, they filed their complaint in the Circuit Court for said county against David Montgomery, sheriff of Madison county, and as *ex-officio* administrator of the estate of Susan A. K. Hampton, deceased, William O. Hampton, lately her husband, and the defendant, William P. Marvin, as surviving partner of the firm named. That in said complaint they alleged that the lands in the hands of D. Montgomery, administrator as stated, belonged to Susan A. E. Hampton; that a mortgage alleged to have been executed by the said Susan A. K. Hampton in her life-time was not made in the presence of a judicial officer of the State of Florida; that she was a married woman at that time, and that William O. Hampton was not the executor of the last will and testament of Susan A. K. Hampton. Plaintiffs allege further that previous to the commencement of this suit the said William P. Marvin, as surving partner as aforesaid, brought an action against William O. Hampton, as executor of Susan A. K. Hampton, to foreclose the mortgage above referred to, and was proceeding to sell the lands mentioned in said mortgage when Da-

vid Montgomery, sheriff and *ex-officio* administrator of the estate of Susan A. K. Hampton, filed his petition in the Circuit Court for Madison county, alleging that he was sole administrator of her estate, denying that William O. Hampton was executor as he claimed, or that any claim had been presented to him by said William P. Marvin, praying for an order to restrain the said Marvin in his action for foreclosure, and that on the 29th December, A. D. 1871, further proceedings in the foreclosure suit were enjoined; that said order was afterwards dissolved, and that plaintiffs are informed that no further proceedings were taken in said suit by Montgomery, he believing that the original foreclosure suit had been abandoned, as they had commenced suit against him as administrator; that in June, 1872, S. Pasco, attoreny for said Marvin, notified the Clerk of Madison Circuit Court to place on the trial calendar the case of W. P. Marvin, surviving partner, &c., against David Montgomery, sheriff and *ex-officio* administrator of the estate of Susan A. K. Hampton, and gave notice to the attorney of said David Montgomery that said cause would be brought on for trial at the next term, but that no further steps were taken in said case. Plaintiffs allege further that in November, A. D. 1873, the attorney for Marvin, without notice, made application for an order to appoint Geo. W. Bogue, sheriff of Madison county, to carry out the judgment of foreclosure aforesaid, and that such order was made.

Plaintiffs deny that William O. Hampton was the executor of the last will of Susan A. K. Hampton, affirm that she died intestate, and that D. Montgomery was the administrator of her estate. They affirm, upon information and belief, that William P. Marvin never presented his claim to such administrator. Plaintiffs further allege that Nicholas Fox was the grandfather of plaintiff, Susan A. E.

Hampton; that by his last will and testament he bequeathed certain property to Susan A. K. Hampton for and during her natural life, and at her death to her children, she dying without issue, the same to go to his son, E. B. Fox, and his grandchildren then living; that the said Susan A. K. Hampton died without issue; that the said E. B. Fox died, and that your oratrix, Susan A. E. Hampton, is the only surviving grandchild of said Nicholas Fox, and was the only one at the death of the said Susan A. K. Hampton, thereby being entitled to the property mentioned.

Plaintiffs allege that during the lifetime of the said Susan A. K. she and her husband desired to exchange the property mentioned in the will for land situated in Madison county, Florida, but could make the exchange only with the consent of your oratrix, she being the only grandchild entitled to said property in the event the said Susan A. K. died without issue, and that your oratrix consented to said exchange, provided she should have the same interest in the land so purchased as in the property bequeathed, and as your oratrix understood the land was to have been conveyed in trust for that purpose. Plaintiffs allege further that on the 5th day of February, A. D. 1872, suit was commenced by them against D. Montgomery, sheriff and *ex-officio* administrator of Susan A. K. Hampton, William O. Hampton, her late husband, and W. P. Marvin, surviving partner as aforesaid; that in said suit answers were regularly filed, except as to W. P. Marvin, who demurred to the complaint, and that afterwards the said Marvin having abandoned his mortgage, as plaintiffs were informed and believe, the suit was dismissed as to him; that after decree of reference, filing of notice of *lis pendcn* describing said land, there was final decree on the 4th of December, A. D. 1872,

whereby D. Montgomery, as administrator, was ordered to turn over to your oratrix the said lands.

Plaintiffs then pray that the judgment of foreclosure of the mortgage stated may be vacated and set aside, the complaint and all proceedings therein dismissed and the mortgage declared null and void.

After various proceedings, none of which, so far as we can see, affect the merits of the case, the defendant, on the sixth of August, A. D. 1877, filed a general answer in the cause. He therein admits that a complaint was exhibited against him as stated in the bill, and that David Montgomery, as *ex-officio* administrator of Susan A. K. Hampton, and William O. Hampton, were defendants with him, but he alleges that the complainants admitted the sufficiency of his defence, which was by demurrer, by their taking an order of dismissal as to him. He alleges that the plaintiffs had notice of his judgment of foreclosure upon his said mortgage, and that Susan A. E. Hampton, if she took any title by virtue of this proceeding, that such title was subject to the lien of his judgment; that the debt upon which the judgment of foreclosure was based was contracted by the late Susan A. K. Hampton and William O. Hampton for necessary family supplies furnished by defendant's firm, and that the parties were occupying the lands as the separate property of Susan A. K. Hampton; that he took his said mortgage without notice of any other title or claim to the land, and upon the assurance that it was the separate property of Susan A. K. Hampton, and avers that as to said land he occupies the position of a *bona fide* purchaser, for valuable consideration, without notice. He alleges that Susan A. K. Hampton died without issue, that William O. Hampton became her sole heir and legatee, and that the mortgage, even if defective as to the estate of the wife while living, became effective

as against William O. Hampton upon her death. He alleges that during the life-time of Susan A. K. Hampton both she and her husband, in good faith, acknowledged the validity of the mortgage. He avers, if letters of administration were taken out in the county of Madison by Montgomery, that such letters were void, as the place of abode of herself and her husband at the time of her death was in Jefferson county. He alleges that he sued William O. Hampton as executor, and not as executor *de son tort*; denies any abandonment of his judgment of foreclosure; affirms that complainants have admitted the justice of his claim by making arrangements for its settlement and compromise, the carrying out of which arrangement they subsequently prevented by their own action in instituting the suits named, and that a memorandum of said agreement was signed by G. W. Hampton and himself, and that to this agreement the said Susan A. E. Hampton, he is informed and believes, agreed. The action of Marvin vs. Montgomery, he alleges, was never brought to judgment, is not in any manner connected with the present suit, and he denies that by his bringing said action he abandoned his judgment of foreclosure. Defendant denies that the mortgaged lands were bought with the proceeds of property derived under the will of Nicholas Fox by Susan A. K. Hampton, as alleged in the bill; alleges that they were the property of said Susan A. K. Hampton at the time of the execution of the mortgage, subject to no trusts or claims whatever in favor of complainant, Susan A. E. Hampton; that the larger portion of these lands were formerly a part of the estate of the late Nicholas Fox; were purchased by him after his removal to Florida, and were not subject to the trusts of his last will and testament; that as to the same he died intestate; that upon his death they descended to his heirs and were inherited by his daughter, the late

Susan A. K. Hampton; that her title thereto was a fee simple title, but the same were liable to her husband's debts, she never having taken the steps required by statute "to make the same her separate property." There was an injunction restraining the sale.

After replication, reference and the taking of testimony, there was a final decree for plaintiffs.

This decree vacated and set aside the judgment of foreclosure of the mortgage of J. M. & W. P. Marvin in the suit against Hampton, executor. The complaint therein was dismissed, the referee was prohibited from making a deed, and the injunction was made perpetual. The court decreed further that Susan A. E. Hampton take the land without prejudice to the rights of the other grandchildren of Nicholas Fox.

From this decree this appeal is taken by the defendant, Marvin.

Pasco & Palmer for Appellant.

Angus Paterson for Appellee.

Mr. Justice Westcott delivered the opinion of the court.

Plaintiffs, George W. and Susan A. E. Hampton, in possession of the land which is the subject of this controversy, assert an equitable title thereto in Susan A. E. Hampton, allege that the defendant, Marvin, is proceeding to sell the same under a judgment of foreclosure of a mortgage obtained by him. The record discloses that such judgment was obtained by Marvin in an action against William O. Hampton in his own right as heir-at-law of, and also as executor of the last will and testament of Susan A. K. Hampton, the said Susan A. K. Hampton having died without children, leaving him, her husband, surviving.

As to the mortgage which defendant seeks to foreclose.

While the record discloses that it was given to secure a joint and several note of William O. and Susan A. K. Hampton, husband and wife, the consideration for said note being miscellaneous family supplies furnished by the defendant, the plaintiffs insist, first, that such mortgage is void and of no effect as to the separate estate of the wife, there having been no separate acknowledgment made of its execution by the wife as required by the statute; second, that under the will of Nicholas Fox, Susan A. K. Hampton's estates in the land terminated with her life, and that at her death, under the circumstances then existing and under the provisions of the will, she, Susan A. E. Hampton, became entitled to an estate in fee simple therein; third, that Susan A. K. never made a will, and that W. O. Hampton never was executor of such will.

Plaintiffs prayed that the mortgage might be declared void, and the proceedings vacated and set aside. The decree of the chancellor set aside the mortgage, established the equitable interest of plaintiffs, and perpetually enjoined the sale in the foreclosure suit.

The case, therefore, is one where a party in possession of land seeks the aid of a court of equity to set aside a mortgage upon said land, and to enjoin a sale of the same under foreclosure proceedings had upon said mortgage, claiming a superior equitable interest therein.

The views of this court as to the general nature of such a proceeding in equity, which is a bill to prevent and remove a cloud upon plaintiff's interest in the land, are to be found in the case of Sanford vs. Cloud, 17 Fla., 568, and we will not repeat them here at length.

We stated in that case that there was one rule of universal application in cases of this character, which was that equity will not act where the title is doubtful, and that he who comes into equity to get rid of a legal title must show

clearly the validity of his own title and the invalidity of his opponent's. If the plaintiffs show no title to protect, it is immaterial to them whether the mortgage was properly executed or whether it was void or voidable as to other parties.

Strictly speaking, plaintiffs seek here to establish an *equitable interest* in this land, and to enjoin this sale under the mortgage. The same rule as to the proof applies to this case.

What is the case made by the bill? The plaintiffs claim under and by virtue of the will of Nicholas Fox, the grandfather of Susan A. E. Hampton and the father of Susan A. K. Hampton. *This will contains no disposition of any land.* It is confined exclusively to bequests of slaves. Plaintiffs claim in their bill that certain slaves were bequeathed "to Susan A. K. Hampton for and during the term of her natural life, and at her death to her children; and in the event she died without issue the said property to go to his son, Edmond B. Fox, and his grandchildren then living; * * * that Susan A. K. Hampton died without issue; that the said Edmond B. Fox died," and that she was the only surviving grandchild "at the death of Susan A. K. Hampton, thereby being entitled to the property so bequeathed;" that during the life-time of the said Susan A. K. Hampton she and her husband desired to exchange the slave property mentioned in the will for land situated in Madison county, Florida, but could make the exchange only with the consent of plaintiff, Susan A. E. Hampton, she being the only surviving grandchild and entitled to said property in the event the said Susan A. K. Hampton died without issue, and that plaintiff, Susan A. E. Hampton, consented to said exchange provided she should have the same interest in the land so purchased as in the property bequeathed, and she

understood the land was to have been conveyed in trust for that purpose.

These are the allegations in the bill as to the interest of Susan A. E. Hampton.

What is the evidence in respect thereto?

William P. Marvin, the defendant, the surviving member of the firm of J. M. & W. P. Marvin, to whom the note and mortgage was given by W. O. Hampton and his wife, S. A. K. Hampton, says that the understanding between him and W. O. Hampton and wife at the time the mortgage was given to him was that the land belonged to Mrs. S. A. K. Hampton, inherited from her father.

Geo. W. Hampton, one of the plaintiffs, says that the land in controversy in his wife's separate estate, and that it was not mentioned in the will of Nicholas Fox.

S. A. E. Hampton, one of the plaintiffs, says: "The land in controversy in this suit belongs to me. It is my separate estate. I brought suit against David Montgomery, administrator of Susan A. K. Hampton, and obtained a decree. I was in possession at the time as a renter. I had rented it from David Montgomery. I looked upon the land as belonging to me by virtue of a will of my grandfather, Nicholas Fox. I was a niece of Susan A. K. Hampton. She has been dead six or seven years. She was the daughter of Nicholas Fox. *She had the land in controversy; she exchanged personal property for this land.* The personal property consisted of slaves. When she exchanged the property for the land, or sold the property and invested it in the land, she consulted me about it. This statement I make on my own personal knowledge. The parties who purchased the slaves refused to take them until I signed away my right to them. They came to my house for the purpose. I signed away my right to the slaves on condition that I was to have the same right in the land. T

proposition was made to me, *or to my father, who was alive at that time,* would I not rather have less slaves or land and a home."

Upon cross-examination this witness says: "*My grandfather, Nicholas Fox, purchased the land in controversy before his death, and lived on it, died on it, and was buried on it.* I claim not directly as a gift from Nicholas Fox, but indirectly, through the transfer of the slaves as above stated. I do not recollect in what year the slaves were sold. There were some six or seven of them. I do not remember how much they sold for. I did not see the money paid or invested in the land. Mr. Thomas Linton and Mrs. Reed were the purchasers of the slaves. My uncle was alone at the time, and *my grandfather made the arrangements and told me about it.* I do not remember in whose name the titles to the land were taken. *They are in my possession, but have not got them with me.*"

W. O. Hampton, the husband of Susan A. K. Hampton, says: "My wife left no will, and I never was executor. I regard the property as belonging to Geo. W. Hampton's wife, Susan A. E. Hampton, and family, by virtue of an agreement *on the sale of the negroes to raise money to satisfy a mortgage on the land and negroes, and to pay other debts of the estate.* She agreed to sign away her interest in the slaves, and did so with the understanding that the land was to be substituted in place of the slaves. The agreement with regard to the slaves was signed and delivered to T. J. Linton. *The other agreement was verbal.* I regarded the slaves as the property of the complainant, S. A. E. Hampton, in the event my wife, S. A. K. Hampton, should die leaving no children, by virtue of the will of her grandfather. My wife died without issue. The debts referred to in the direct examination as having been paid by the sale of the negroes were debts of the estate of Nicholas Fox and Ed-

mond Fox, who acted for his wife, Susannah Fox, in the management of this estate. The title to the land conveyed by the mortgage to Marvin was *in my wife, S. A. K. Hampton. She derived it, or at least a part of it, from her father, Nicholas Fox, and upon the death of her mother and brother, Edmond B. Fox.* This land was not mentioned in the will of Nicholas Fox. My wife came into possession of this land about five years after our marriage by virtue of the will."

Mrs. L. W. Fox, the mother of plaintiff, Ssuau A. E. Hampton, says: The land in controversy was purchased from Tom Linton by Nicholas Fox. She does not know what price he paid for it. The negro property mentioned in the will was sold, and the proceeds used to pay for the lands. Could not say exactly when the payments were made. That Mr. Linton told her repeatedly that old Mr. For bought the land from him.

There is a map in evidence which the parties agree show the entries of the land, as stated upon the county map of Madison county, to be as follows:

The SE¼ of SE¼ Sec. 4, the SW¼ of SW¼ of Sec. 3, the W½ of NE¼ and part of E½ of SW¼ of Sec. 9, were entered by E. B. Fox.

The W½ of NW¼ of Sec. 10, the E½ of NE¼ of Sec. 9, was entered by Susan Fox. The W½ of SE¼, Sec. 9, appears not to be entered at all, and the remaining entries, constituting a considerable portion of the land, were made by J. W. O'Neal and S. W. Williams.

This is all of the testimony bearing upon the subject of interest in the land in the plaintiff, Susan A. E. Hampton.

Of this testimony it may be said *that it does not in any way establish the case made by the bill.* For this reason the law applicable to such a case need not be stated. The case made by the bill is one in which an exchange of slaves, in

which she had a life estate, is made for this land by Susan A. K. Hampton, Susan A. E. Hampton being entitled to the slaves upon her death without issue, she being the then only surviving grandchild of Nicholas Fox.

All the witnesses agree that the land was not mentioned in this will. The plaintiff, Susan A. E. Hampton, testifies upon her direct examination that Susan A. K. Hampton had the land during her life, and that she exchanged the personal property mentioned in the will for it with her consent, the parties refusing to take the slaves until she signed away her right to them. When this witness speaks more definitely she states that this proposition was made to her, *or to her father who was alive at that time,* would she not rather have "less slaves or land and a home." She says again that her grandfather, Nicholas Fox, *purchased the land in controversy before his death,lived on it,died on it,and was buried on it.* She says also that her grandfather made the arrangements and told her about it. A very significant fact about the testimony of this witness is that she admits that the titles to this land are in her possession, and that while they are not produced she does produce a map containing the entries made of this land. We can see no objection to this map of entries, but how the original entries were made is certainly less material in a contest between these parties than proof of the deed of conveyance, under and in subordination to which both of these parties claim.

W. O. Hampton states in general terms that there was a sale of negroes to raise money to satisfy a mortgage on the land *and negroes and to pay other debts of the estates* of Nicholas Fox and Edmond Fox, who acted for his wife, Susannah Fox, in the management of this estate. He also states that the sale of the slaves was made in writing, but that the agreement as to the application of the moneys arising

therefrom was verbal. This witness again states that his wife derived the land, or *at least a part of it,* from her father, Nicholas Fox, upon the death of her mother and brother, Edmond B. Fox, and that she came into possession of the land about five years after his marriage. When he was married nowhere appears.

Mrs. L. W. Fox, the mother of Susan A. E. Hampton, and we presume the wife of the brother of Susan A. K. Hampton, says that the land in controversy was purchased from Tom Linton by Nicholas Fox.

A reasonable conclusion following from this testimony is that some of the money produced by the sale of the slaves to Linton was applied to the payment of sums due for the purchase of these lands, but whether that sum was ten dollars, one hundred dollars or one thousand is not established. The most that can be insisted upon is that the testimony establishes that this land was bought by Susan A. E. Hampton's grandfather, Nicholas Fox, of Thomas J. Linton, and that her grandfather "lived upon it." W. O. Hampton, while himself very indefinite, speaks with greater certainty than any other witness, and he says that the negroes were sold to raise money to satisfy a *mortgage on the land and negroes and to pay other debts of the estates of Nicholas Fox* and *Edmond Fox*, who acted for Susannah Fox in the management of this estate, that is, we presume, the estate of Nicholas Fox.

We do not propose to enter into elaborate discussion of the questions of fact here involved.

Admitting, for the purpose of disposing of this case, that the sale of these slaves was had after the death of Nicholas Fox, and that a partial application of the funds arising from this sale was made for the satisfaction of a mortgage upon this land, and that Susan A. E. Hampton would have to that extent an equitable interest which a court of equity

would protect against everyone except a *bona fide* purchaser for value without notice, and that the defendant was not such purchaser, still it must be apparent here—first, that the conclusion that *all* of the land covered by this mortgage was thus paid for is not established; and second, that the amount thus applied may have been ten dollars or one thousand, and be consistent with it. In other words, the testimony does not establish any particular interest in the land, and the court cannot possible determine such interest, or make an intelligent and just decree in the premises.

The general rule upon this subject is that the substance of the case, as made by the pleadings, must be proved; that is, all the facts alleged upon the pleadings which are necessary to the case of the party alleging them, and which are not the subject of admissions, either in the pleadings or by agreement, must be established by evidence. The plaintiff must prove so much of the allegations of the bill as are necessary to entitle him to a decree. Daniell Chy. Pld. and Pract., 857. Where he fails to do so, the bill should be dismissed. 27 Ill., 230; 3 Tenn. Chy., 223.

The bill and other pleadings in this case show that much importance is attached to certain suits which have been heretofore instituted as to this land. To the action of Geo. W. and Susan A. E. Hampton against David Montgomery, sheriff and *ex-officio* administrator of Susan A. K. Hampton and William O. Hampton, the defendant, Marvin, was originally a party defendant, but the suit was dismissed as to him before final hearing. Neither party presents a transcript of the record in that case. For that reason we cannot determine accurately the nature of the order dismissing the case as to him. The defendant, in his answer, states that "his defence was by demurrer," but he does not allege that the action was dismissed after hearing upon the demurrer, while the plaintiffs allege that the suit was dis-

missed as to him on account of his abandonment of his action to foreclose his mortgage.

We cannot see that the plaintiffs here can insist that their judgment against Montgomery can bind this defendant, because he was no party thereto. They had dismissed their bill as to him. Nor can the defendant upon the record before this court insist that the order dismissing as to him was an adjudication of a superior right in him under his mortgage. A defence of this kind proceeds upon the ground that the same matter was in issue in the former suit, and when such defence is relied upon the defendant should at least set forth so much of the former proceeding as will suffice to show that the same point was then in issue, and should aver that the allegations as to the title to relief against him were substantially the same in the second bill as in the first. In addition to this, a decree, to be a bar, must be in its nature final as to the subject-matter, or be so made by subsequent order. Story's Eq. Pldg., §791; Daniell Chy. Prac. & Pldg., §§659-660.

The defendant in this case fails to set forth with sufficient certainty the nature of the order made in the case in which he insists the questions here involved were as to him determined. He does not even set forth the order itself. It devolved upon the defendant to make and prove this defence in a proper manner to make it available here.

As to the other suits. To the actions by Marvin against Hampton as executor, and in his own right and against Montgomery as administrator, plaintiffs were not parties, and are therefore not bound by the decree or judgment.

The injunction obtained by Montgomery against Marvin was dissolved; that proceeding therefore cannot affect either of the parties here.

The merits of this controversy are to be found entirely outside of the proceedings in these suits.

The decree is reversed, and the case will be remanded with directions to dismiss the bill.

SARAH B. LAMAR, APPELLANT, VS. JOSEPH PALMER, COLLECTOR OF REVENUE, APPELLEE.

1. The owner of promissory notes or other credits, whether secured by mortgage or not so secured, is liable to be taxed upon the value of such credits.
2. A tax upon notes or obligations secured by mortgage upon land, the land mortgaged also being taxed, does not present a case of double or unequal taxation.
3. "Debts due from solvent debtors," taxable by the terms of the statute, refers not to the general solvency of the debtor, but to the amount of the debt which may be realized or collected; *i. e.*, the value of the debts.

Appeal from the Circuit Court for Jefferson county.

The appellee, as Collector of Revenue of Jefferson county, levied upon and advertised for sale lands of the appellant to collect the taxes. The bill alleged that the sale would cloud the title to the lands.

The other facts are stated in the opinion.

T. L. Clarke for Appellant.

White & Henderson for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Appellant filed her bill in equity and prayed an injunction restraining the sale of her property to satisfy a tax levied against her as the owner of certain promissory notes given for the purchase of land, and secured by mortgage upon the land. The notes and mortgate purport to secure the sum of $50,000. They are assessed at the value of $25.000.

that being the estimated cash value of the notes, and the tax is computed upon that sum. Beyond the mortgage she has no security, and the mortgagor is insolvent. The taxes assessed against the land have been paid by the owner.

It is claimed by the bill that complainant is not liable to be taxed upon the notes or the money thereby secured; that they are not property inseparable from the security, and the security, *i. e.* the land, was assessed and taxed, and this tax has been paid; and upon the further ground that the notes do not constitute a debt owed by a "solvent debtor." The defendant demurred to the bill for want of equity, and the chancellor sustained the demurrer and dismissed the bill.

Complainant appeals and prays a reversal upon several grounds of error set out in her petition.

The constitutional provision touching the principal question involved is found in Sec. 1, Art XII.:

"The Legislature shall provide for a uniform and equal rate of taxation, and shall provide such regulations as shall secure a just valuation of all property, both real and personal."

Excepting such as may be exempted for certain purposes.

Section 3 of Chapter 3099, Laws of 1879, says "the term personal property * * shall be construed to include all goods and chattels, money and effects, * * all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage or otherwise," &c.

The Constitution contains no limitation as to the objects of taxation, or the character or quality of the property or things which may be made to contribute to the support of the government, and there is, therefore, no limitation upon the power of the Legislature in that respect. The argument of the appellant is that the principle of equality and uniformity is violated by taxing the land upon its value,

and again taxing the interest of the mortgage creditor in the same land, which it is claimed is double taxation.

This proposition might have force if it were true in point of fact. The land is assessed and taxed at its estimated value. The holder of the notes is taxed, not upon an interest in land, but as the owner of so much money at use; that he had security upon real estate for the ultimate payment of the money only gives additional value to the notes, and value gives to the notes the character of property. The land is productive, and has value for that as well as other reasons, and its value is estimated for the purposes of taxation with reference to its usefulness and the income that may be derived from it. The owner may pay the notes and keep the land, according as he has success in getting and saving money; the property, therefore, in the land and the property in the notes are not the same property or value. The notes may be equally valuable, independent of the mortgage security; other security or pledges may exist; or the maker being solvent the notes may be collectable without other security. Can it be well insisted that the holder of a note is liable to be assessed and taxed upon its cash value when he holds no collateral security; but if he holds security by mortgage on land which is taxable his money escapes taxation by reason of the security and the practical certainty that it will be paid? The owner of money is liable to be taxed upon it (except such as may be exempt by the laws of the United States) even when it is locked in his chest and is producing no income. Why should it be exempted from taxation if loaned at interest and secured by mortgage upon taxable property and yielding an income?

The appellant relies mainly upon the argument contained in the opinion of the Supreme Court of California in the People vs. The Hibernia Savings Bank, 51 Cal. R., 243.

The doctrine of that decision was directly opposed to the previous uniform ruling of the same court by other Judges. It had been decided uniformly that promissory notes and other credits were property, and as property liable to be taxed at their value. 34 Cal. R., 433; 35 id., 677; 37 id., 54; 38 id., 461; 43 id., 590; 46 id., 417, and other cases.

In the Hibernia Bank case (51 Cal., 243,) the court holds that credits (secured or unsecured) are not property, within the meaning of the Constitution of that State, for the purposes of taxation; that the creation of debts does not add to the aggregate property of the State; that actual tangible property is the basis of the value of credits, and the payment of all the debts owing in the State and the extinction of all promises to pay money would not diminish the aggregate value of property; that the property, which is the basis of all credit, is taxed, and a tax upon the credit is simply an additional tax upon the same value, payable out of the taxed property.

The conclusion of the court was that the taxation of credits was not warranted by the Constitution, whether such credits were secured or unsecured.

That decision was not only contrary to every prior utterance of that court, but against the established rule of law elsewhere prevailing, as well as against the universal legislation of the country.

Burroughs on Taxation, at p. 59, makes this rather irreverent commentary upon the decision: "If this be true, then the vast sums loaned in this country and secured by mortgage, the negotiable paper of the country, the bonds of municipalities, of States and of the United States, all of these securities are not property, they are mere evidences of debt. We venture to affirm that the idea that these evidences of debt are not property in the legal acceptation of that term never before entered the brain of a lawyer. Ac-

cording to this rule an acre of land in some remote part of the State not worth five dollars is property, but a debt of $20,000 secured upon real estate in San Francisco worth $100,000, yielding an annual income of $1,600, is not property, and the framer of the Constitution intended that the owner of the acre of land should contribute to the support of the State, but not the owner of the mortgage."

We incline to think that Mr. Burroughs mistakes the position of the California court when he says that they held that such evidences of debt were "not property." For the court say that "in a certain sense a promissory note, or any credit, is property" when it has value, and "in any case a credit has no value other than the value it has acquired by reason of the probability that the property, having a present actual value upon which a tax is levied and collected, will be applied to the satisfaction of the claim it represents. He who has the property in possession must be taxed on its value, and the value once taxed cannot be re-taxed without a violation of the constitutional provision that each value shall be taxed proportionately to the sum of all the values."

This is the gist of the ruling of the majority of the court in that case.

As to the mortgage, or in case of a sale of land on credit without mortgage, the holder of the notes for purchase money, it is settled in several States that the taxation of the credits as his property is not double taxation. Burroughs on Tax., 57; People vs. Rhodes, 15 Ill., 304; State vs. Manchester, 1 Dutch., 531; People vs. Whartenby, 38 Cal., 461; State vs. Williamson, 33 N. J. L., 77.

And a note given for the purchase money of land, secured by mortgage, comes within the description of money at interest. Hammersly vs. Franey, 39 Conn., 176; State vs. Manchester, 1 Dutch., 531; State vs. Massaker, 2 id., 564.

Cooley on Taxation, p. 6, cites from the author of "Wealth of Nations" the following, among other maxims, relating to taxation:

"1. That the subjects of every State ought to contribute to the support of the government as nearly as possible *in proportion to the revenue which they respectively enjoy* under its protection."

Judge Cooley observes, p. 8: "Of these maxims, the wisdom of which has secured for them universal acceptance, * * the first and third address themselves to the Legislature which frames the reveune laws."

"There is nothing poetical about tax laws. Wherever they find property they claim a contribution for its protection, without any special respect to the owner or his occupation." 32 Pa. St., 381.

In Phil. Sav. Fund vs. Yard, 9 Pa. St., 361, the court gives this example: "Where A. borrows money on mortgage and loans it to C. on bond, who loans a part of it to D., it is taxed in the current of each actual employment. In the complexity and involutions of business a dollar is employed many times in a day, and in each actual employment represents the property, business or the person of him who uses it. And in cases of this kind it is the usufruct and not the actual or identical money that is taxed." And in Augusta Bank vs. Augusta, 30 Me., 259, Shepley, Ch. J., says: "Thus stock in trade may be taxed to the owner, while he may be indebted for it to many persons who may be taxed for those debts, or the money loaned to purchase it. Real estate may be taxed to a mortgagor in possession while the mortgage is taxed for the money secured by the mortgage. * * So imperfect are all human institutions that perfect equality in the imposition of burdens is not to be expected. These provisions for valuation are not considered to be in conflict with the general purpose to have all

property subjected to taxation once, and only once at the same time."

In Ala. Gold Life Ins. Co. vs. Lott, 54 Ala., 499, the court, Manning, J., says: "It may be that by some subtle process all the taxes that are charged against the lender of money or seller of property for the amount which the borrowers or purchasers owe him therefor, as 'solvent credits,' get back and fasten themselves upon their property; and it may perhaps be true that the highest public interests would be promoted by assessing all taxes upon the real estate of a country." * * *

"So long as the tangible property of the country is actually distributed among the people, and one man is indebted to another among them, and so long as incomes are received by the creditor class from their credits, as well as by the property-holders from their property, it will not be possible to convince the latter, even (perhaps we should say especially) the debtors of that class, that it would be either just or expedient to tax the property from which their incomes are derived, and not the credits from which the incomes of the creditors are derived. It should be remembered that taxes, being regarded as the contributions of the people for the support of the State, must be assessed on such subjects of taxation as the people, by their representatives, choose to designate; and they have chosen, during the whole period of our history, to say that credits, or the moneys that the creditor class have out at interest, shall be subject to taxation as well as the tangible property which, by the employment of labor and skill, is made to return valuable products for its owners." The same court referring to the case of the Hibernia Bank, (51 Cal., before cited,) declines to put the same construction on the provision of the Constitution in respect to equality and uniformity of taxation as that held by the California court in that case, and holds

that in the absence of plain constitutional restrictions, it rests within the wisdom of the Legislature to determine the subjects of taxation, and that there being nothing in the Constitution of Alabama (which is like that of California, and also of Florida in that regard,) which forbids the taxation of credits secured by mortgage on property which is also taxed, the legislative act expressly subjecting them to taxation is valid.

From the time of the organization of local government in Florida the Legislature has insisted upon levying taxes upon money loaned and money at interest. It has been deemed just that those who have money at interest should, equally with those who were taxed for the possession of tangible real or personal property, pay taxes for the protection they received at the hands of government; and especially is it equitable that those whose income from money at interest is secure and certain should pay taxes according to the value of their investment, while the owner of lands and other property is obliged to pay taxes upon the value of his property, although he may be embarrassed with debts and his income precarious. With this legislation upon the statute books, declaring solvent credits to be property liable to taxation, the present Constitution of the Sate was adopted. Its requirement that all real and personal property (except churches, &c.,) should be assessed and taxed includes everything then known as taxable property. The legislation subsequent to the adoption of the Constitution, declaring that the term personal property should be construed to include money due, or to become due, "on account, contract, note, mortgage or otherwise," was in harmony with the laws existing when the Constitution was adopted, and is not in conflict with any of its provisions.

Appellant makes the point that by the statute "debts

due or to become due from *solvent debtors*" are taxable, but that according to the allegations in this bill the mortgagor here is not a "solvent debtor;" that he has no property except the land mortgaged, which is worth only half the amount due upon it, and he is utterly insolvent. And so it is claimed the money due upon these notes, or any part of it, is not liable to taxation by the terms of the act. The notes and mortgage call for $50,000 or more.

The Assessor and the County Commissioners have estimated that the value of the debt secured by the mortgage is about $25,000, and the tax is imposed upon that sum as the valuation. It is evident that the Legislature intended to assess all credits at their actual value, to-wit: the amount of money certain to be realized upon them. By the use of the words "due from solvent debtors" it was undoubtedly intended to include and mean so much as the debtor or his property would be able to pay. To that extent a debtor is solvent—good for so much money. If a debtor owes ten thousand dollars and his property and means marshal at nine thousand nine hundred, he is "insolvent." But was it intended that the creditor should escape taxation upon the ninety-nine hundred because his debtor was thus insolvent, and because he could derive no income from the $100? A debtor is solvent to the extent that he can pay, though insolvent as to what he cannot pay. This is the sense in which the phrase "solvent debtors" is used in the revenue law.

It may be there is a hardship in the case—it may be the complainant may purchase the land to satisfy her mortgage claim, but the presumption is the land will sell for what it is worth (if she chooses to foreclose and sell), and that a purchaser will pay the money. In that case she will encounter no hardship, but will pay taxes upon what she actually has in good money.

We are satisfied that the rule which has heretofore universally prevailed, (notwithstanding the recent construction given by the California court to the Constitution of that State,) is just and equitable, and that it should not be changed or waived in a given case because a hardship may result to her on account of the misfortune of her debtor by its enforcement.

The decree of the chancellor is affirmed.

THOMAS L. WHITLOCK, APPELLANT, VS. THEODORE H. WILLARD, SHERIFF AND EX-OFFICIO ADMINISTRATOR OF BENJAMIN F. WHITLOCK ET ALS., APPELLEES.

1. The general rule in cases of this character (appeals in chancery) is to enter the appeal in the name of all the parties against whom the decree is rendered, and one party may take the appeal in the name of all his co-defendants without first obtaining their consent. If the other parties do not unite in the appeal, or in prosecuting the appeal, those prosecuting may have a summons and severance as to those who will not unite. And when there are more defendants than one all of their names must be in the appeal, unless it be a case where one may appeal, or it will be dismissed. A citation giving notice of the appeal to the co-defendants, requiring them to join in the appeal, returnable to the term to which the appeal is returnable, issued and served as the citation to the respondent is required to be issued and served, will be equivalent to a summons issuing from this court after the appeal is docketed here, and such orders as to severance will be made here as the nature of the case may require.
2. Where the appeal is irregular for the want of proper parties, they may be made parties here by amendment, and citation may be awarded. In this case, no objection being taken to the irregularity by the respondent, the court in its discretion allows the amendment.
3. While an administrator may, under the statutes of this State, maintain an action of ejectment upon the title of the intestate to recover

possession, yet not being an owner, joint tenant, tenant in common or coparcener, within the meaning of the statute giving such persons a right to partition, he cannot have partition.

Appeal from the Circuit Court for Leon county, to which the case was transferred from Madison county.

The intestates mentioned in the bill, and of whose estates T. H. Willard is administrator, are Lewis D. Whitlock and Benjamin F. Whitlock. The appeal was brought to the January Term, 1880, and the opinion as to dismissing it was filed at that term. There was no motion to dismiss.

The other facts bearing on the question of dismissal are stated in the opinion.

Pasco & Palmer and *J. N. Stripling* for Appellant.

Angus Patterson for Willard, Administrator.

John B. Marshall for W. W. Whitlock *et als.*

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an appeal from a decree rendered by the Circuit Court of the Second Judicial Circuit for Leon county on the 24th day of September, A. D. 1879.

The bill was by Willard as the legal representative of the intestates mentioned. He alleged that under the will of Joseph Wardlaw, deceased, his intestates were entitled to a portion of a tract of land in Madison county.

The bill was brought against several parties, among others against Thomas L. Whitlock, the appellant, who claimed an interest as heir-at-law of some of the devisees under the will, who had died, and as a party who had been in possession of the estate, appropriating the rents and profits thereof, and who claimed a homestead in a part of the estate.

The decree from which this appeal is taken settles the

interest of all the parties in the land. In addition to the defendant, the other parties against whom the decree was rendered, and who claimed an interest in the land, were William W. Whitlock, L. A. Minor Thomas, William S. Vandiver, Hattie Vandiver, James Jones, Lucia Jones, Oscar D. Jones, John H. Jones, Anna Jones, Thomas S. Crayton and Thomas S. Crayton, Jr.

The primary object of the bill was for a partition, and the decree awarded a partition in accordance with the views of the chancellor as to the interests of the various parties having rights under the will.

The questions discussed upon the hearing here were very interesting, but after a careful examination of these questions, and when ready to dispose of the case upon the merits, we are met by a difficulty which is insuperable. Of the defendants, all of whom claim an interest in the land devised, one only takes an appeal. It is impossible to make a decree here affecting the interest of this appellant without affecting the interest of the other parties named defendants in the decree from which the appeal is taken, and is absolutely essential that they, or at least some of them, should be before this court. As a matter of course the other parties cannot prevent this appellant from having here an adjudication of his rights, but as they cannot be determined without affecting the rights of others, they should be before the court. If he alone wishes to prosecute the appeal he must do it with proper notice to them and severance. 20 Wall., 158; 12 How., 327; 16 How., 142; 12 Pet., 140; 14 Wall, 402; 8 Pet. 526; 13 Fla., 596; 16 Fla., 498; 8 John., 558; 23 Wend., 621; 14 Ohio State, 287.

The appeal is dismissed.

At the same term, on April 8th, and after an order had been entered dismissing the appeal, the appellant entered a motion and filed the following petition to set aside the or-

der of dismissal and to reinstate the case, and for leave to amend:

The petition of T. L. Whitlock by his counsel and solicitors, Pasco & Palmer and J. N. Stripling, respectfully sets forth the following matters in connection with the above-stated cause, with his prayer for relief:

That the record of the cause shows that Theodore H. Willard, as *ex-officio* administrator of Lewis D. Whitlock and Benjamin F. Whitlock. was the complainant in the court below, and that he was there represented by Angus Paterson, Esq.—this will appear by the bill and subsequent proceedings.

That Thomas L. Whitlock, William W. Whitlock, Amanda Thomas and her husband, L. A. M. Thomas, John H. Jones and others were defendants. having separate interests of different values, and some of them adverse to all the others; that Amanda Thomas and her husband were represented by J. B. Marshall and F. P. Paterson, Esquires, and John H. Jones and all the other infants and the husbands of the married infants were represented by C. W. Stevens, Esq., a solicitor of this court who was duly appointed guardian *ad litem* of the infant defendants; that Thomas L. Whitlock and William W. Whitlock were represented by Messrs. Pasco & Palmer, all of which will appear by the answers of the said parties. the order appointing the guardian *ad litem*, and other papers on file and upon the records of the cause.

That so far as the said Thomas L. Whitlock was affected by the decree fixing the interests of the several parties in the lands sought to be partitioned, he, as heir of the children of his late wife and himself, who died before their mother was found to have no interest in the said lands, and he was by the very circumstances of the case severed from his connection with the cause in that relation as heir of such child-

ren; that up to that time he and his son William were represented by the said counsel, although they filed separate answers, the son not contesting the father's claims and accepting the opinion of the said counsel as to the extent of his interest in the said lands. As soon as it was found that the court gave to the said William W. Whitlock a larger interest in the said lands than had been claimed for him by his counsel their interests were entirely severed, and the former counsel for both parties thereafter represented only the father, and Messrs. Marshall and F. P. Paterson thenceforward represented William W. Whitlock as well as the interests of Mr. and Mrs. Thomas, and he has so here acted, as the files and record of the court show.

That the other defendants refusing to appeal from the interlocutory order fixing the interests of the parties in the land, and excluding the said Thomas L. Whitlock from participation in the partition thereof as heir of his children, who died before their mother, the said Thomas L. Whitlock entered his appeal therein in writing on the 30th day of December last, having previously so done at the hearing, which appeal appears upon the record in this court.

That on the 12th day of January he gave all the said parties due notice of this appeal in writing, which notice all of the said parties accepted in lieu of a formal citation and summons, and waived the service of a writ, as will appear by the written acceptance of such notice upon said notice in the record, duly signed by the several counsel for the respective parties and by the guardian *ad litem* for the said infants.

That Angus Paterson, Esq., and J. B. Marshall, Esq., have appeared here according to the terms of said notice, argued the cause and filed their briefs herein, and the said guardian *ad litem* has had the opportunity so to do. The

said Marshall has not only, on behalf of his clients, refused to join in the appeal, but has resisted the same in his argument.

And the petitioner suggests that if a summons and severance is or was necessary in this cause, that there has been action therein equivalent thereto, and if a formal severance is necessary that the same can be entered of record and the cause still be heard and determined upon its merits; that a dismissal of the appeal will be attended with great cost and expense, which he is ill able to bear, having already been put to much expense and a lengthy and burdensome litigation about the said lands, and he prays that the cause be reinstated as it stands upon the record, or upon such terms or with such amendments as the court may direct; and that this petition may be held and regarded as an amendment and addition to his petition of appeal so far as it brings to the attention of the court such matters as should have been stated therein.

On the same day the court made an order reinstating the case on the docket, and Mr. Justice WESTCOTT at the same term, on the fourth day of May, delivered the following opinion on the petition:

This is a petition and motion to set aside the order dismissing the appeal to reinstate the case, and for leave to amend by adding proper parties in conformity to the record of the Circuit Court.

The practice in such cases as this in most of the States is to take out the appeal in the name of all the parties against whom the decree is rendered, and one party may take the appeal in the name of all his co-defendants without first obtaining their consent. If the other parties do not unite in the appeal, or in prosecuting the appeal, those prosecuting may have a summons and severance as to those who will

not unite; and where there are more defendants than one, all of their names must be in the appeal or it will be dismissed. This is the general rule. A citation giving notice of the appeal to the co-defendants, requiring them to join in the appeal returnable to the term to which the appeal is returnable, issued and served as the citation to the respondent is required to be issued and served, (Equity Rule, 95,) will be equivalent to a summons issuing from this court after the appeal is docketed here, and such orders as to severance will be made here as the nature of the case may require.

In this State this question in reference to an appeal in a chancery case has never been directly decided, although in the case of Loring vs. Wittick, 16 Fla., 495, it was intimated that the general rule above stated would control. The other cases in this court were writs of error.

The principal ground upon which the appeal in this case was directed to be dismissed was because the appeal was not taken in the name of all the parties defendant against whom the judgment was rendered. The apppeal as entered is from an interlocutory order and other proceedings in the case of "T. H. Willard, sheriff, and *ex-officio* administrator, &c., vs. T. L. Whitlock vs. W. W. Whitlock, Thomas and wife, *et al.*" The case as stated in the petition of appeal is "Thomas L. Whitlock vs. T. H. Willard, as sheriff and *ex-officio* administrator of B. F. Whitlock, *et al.*"

In the case of Deneale vs. Stirps' Extrs., 8 Pet., 526, the writ of error was in the name of "Mary Deneale and others" as plaintiffs. Chief-Justice Marshall for the court, in dismissing the appeal for irregularity, said: "Who the others are cannot be known to the court, for their names are not given in the writ of error as they ought to be. Mary Deneale cannot alone maintain a writ of error on this judgment; but all the parties must be joined and their

names set forth in order that the court may proceed to give a proper judgment on the case." 4 Ga., 403; 4 Minn., 23; 50 Ala., 404.

There are some cases in which one party alone may appeal or prosecute a writ of error, but this is not such a case. One of the appellant's co-defendants, William W. Whitlock, has not only failed to unite with him in this appeal, but by the admission of the appellant this co-defendant is interested in maintaining this decree which the appellant is seeking to reverse. In such a case the appellant cannot seek to reverse the decree here in any matter which will injuriously affect his co-defendant's interests, unless his co-defendant is a party. 93 U. S., 38. It may be said that this party has appeared by his counsel, and has been heard in support of the decree. While this is true it is also the fact that nowhere in the proceedings in this court does he appear as a party to this appeal, and we do not propose to be so irregular in our proceedings as to enter a judgment against a party by reference to the brief of his counsel, the only thing here which shows his appearance for William W. Whitlock. He must appear by the record of this court to be a party here.

In like manner the other defendants should be parties here. One of the principal reasons given for the rule is to prevent a multiplicity of suits in the shape of repeated appeals by the several defendants.

Here also Thomas L. Whitlock, the appellant, claims as against all of the parties to this suit an exclusive right to a part of the land in the matter of the partition. He claims a homestead. This decree denies all right of some of his co-defendants, as well as all right of the appellant to a share in this land, and their claims are of like character, although they may be different in degree. If he and they have any interest in the land, the court has determined

against the general interest. There is no difference in principle between the nature of this decree and a decree directing several defendants to convey their interest in land to a complainant, and in such case the appeal should be in the name of all. 7 Pet., 339.

Nor is there in principle any difference between this appeal and an appeal by a person in a case where his co-plaintiffs were in a like condition with himself, such as a general creditor's bill, and in such case the other creditors are necessary parties. 93 U. S., 38.

After careful examination of the question, however, we think that the petition of appeal may be amended to conform to the record of the Circuit Court, and that upon citation to the co-defendants thus named, parties here, the case may proceed.

Summons and severance, as applicable to an appeal in chancery, was a thing unknown to English chancery practicce.

Chief-Justice Marshall, in Owings vs. Kincannon, 7 Pet., 399, which we believe was the first case of an appeal of this character in the Supreme Court of the United States, said: "The language of the act which gives the appeal (1 Stat's. at Large, 73.) appears to us to require that it should be prosecuted by the same parties who must have been necescary in a writ of error. We think also that the same principle would be applicable from the general usage of chancery to make one final decree binding on all the parties united in interest." He also said in this case: "We have, however, found no precedent, in chancery proceedings, for our government in this case."

We see no necessity for discussing the question of amendment at length.

The following authorities show that the amendment may

be made and the citation awarded in this case: 29 N. J. Eq., 375; 42 Ala., 404; 10 Ga., 2; 13 Ohio State, 569.

It is by analogy to the rules controlling in writs of error that these rules as to appeals in chancery are adopted, and by the same analogy we should adopt the rules as to amendments. The rule controlling the amendment of writs of error in this State is stated in Loring vs. Wittich, 16 Fla., 326. In this case the objection was taken by the court and not by the respondent.

Amendment allowed and citation returnable to next term awarded.

On May 4th, on the motion to amend by inserting as parties plaintiff to the appeal the names of the appellant's co-defendants in the Circuit Court, and to make the parties in the Supreme Court conform to the parties in the Circuit Court, it was ordered that the motion be granted, and that the names of the parties be made to so conform, and that a citation, returnable to January Term, A. D. 1881, be awarded as to the defendants resident in this State, and that thirty days' notice by publication be given to non-resident defendants. It was also, on suggestion by the appellant of the death of Frances A. Thomas and of the names of her legal representatives and successors in interest, ordered that unless they should become parties within three days of the January Term A. D. 1881, of this court, the appellant should be entitled to have the record opened and the decree reversed if erroneous.

At the January Term, 1881, the case was submitted.

The fact are stated in the opinion.

Pasco & Palmer and *J. N. Stripling*, for appellants, cited in support of the view that an administrator cannot maintain a suit for partition Freeman on Cotenancy, §§454-471; Thomp. Dig., 382; Nason vs. Williard, 2 Mass., 478; Speer vs. Speer, 14 N.J.Eq.,240; Barbour on Parties, 273,et seq.

Angus Paterson, for Willard, the administrator, contending that an administrator could maintain such a suit, cited Thomp. Dig., 202; Blewitt, Adm'r, vs. Nicholson, Ex'r, 1 Fla., 384, and 2 Fla., 200; Gilchrist vs. Filyau and wife, 2 Fla., 94; Union Bank vs. Heirs of Powell, 3 Fla., 175; Scott vs. Lloyd *et ux.*, 16 Fla., 151.

J. B. Marshall for W. W. Whitlock and the heirs of L. A. M. Thomas.

C. W. Stevens, guardian *ad litem* of John Henry Jones *et als.*, minors, in *pro. per.*

R. B. Whitfield, guardian *ad litem* of Hattie C. Thomas *et als.*, in *pro. per.*

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The first question involved in this case is whether an administrator, under our statute, has an equitable right to a partition.

In the case of Sanchez' administrators vs. Hart, (17 Fla., 507,) decided at the last term, we held that an administrator could maintain in this State ejectment upon the title of his intestate.

This right, as we there in substance stated, followed necessarily from the duties imposed upon him, and from the express language of the statutes defining his powers and rights, as well as by the decisions of the courts of these States where a similar statutory policy prevailed.

While it was admitted that such was not the general rule at common law, we could not see how any other reasonable conclusion could be reached here.

In the matter of partition in equity, however, we cannot see where, either before or since the statute of this State controlling this subject, an administrator can be held to

have such right, and we have been unable, in our examination, to find a single case which sustains such a proposition. On the contrary, the law as announced, so far as we know, without exception, under every statutory policy, is that he cannot 2 Mass., 478; 41 N. H., 501; Freeman on Cotenancy and Partition, §§454-471.

This, too, must be true upon general principles. The extent of the power of the administrator, so far as concerns the *disposition of the estate or interest* of his intestate as distinct from his right of possession for its settlement, is a power of sale to be exercised in a particular manner, after prescribed judicial proceedings, and the rule is that a power of sale, independent of and not after judicial proceedings, does not include a power or right of partition. 11 Ves. Jr., 467. If this is true of a power of sale, to the exercise of which no judicial proceeding is necessary, how much stronger is the case as against the right to partition when the power is a statutory power like that of an administrator where exhaustion of personal assets or other jurisdictional facts must exist before the judicial power can be operative to authorize the administrator to sell.

Under the statute, all persons interested in the lands are to be defendants, but the right to institute the suit is in a joint tenant, tenant in common or coparcener, and a careful examination will show, beyond doubt, that it is contemplated that the "owner," or one of the "owners," shall commence the action.

The administrator has no absolute estate in himself in the real estate as assets—all that he does, indeed, is *en autre droit*. As was remarked by the Supreme Court of Michigan in Campau vs. Campau and others, 25 Mich., 127, "the right of an administrator under the statute to the possession of the real estate of his intestate, and the rents and profits thereof, pending the settlement of the estate, is not

an estate or right of property, nor is it an interest which the administrator can dispose of as such." He is entitled to possession, but that possession does not divest the heir of the fee, who holds subject to this right of possession for temporary purposes, and subject to these defined statutory powers of sale. Notwithstanding the administrator's right of temporary possession, the heirs have a right to a standing in a court of law or equity commensurate with their interest and estate in the land, and that is in quantity all of his ancestor's estate except as limited by the right of temporary possession of the administrator, and the rights of creditors and dower of the widow. In the language of the Supreme Court of Alabama, the statutes "intercept the right of the heir to enter upon and enjoy the estate of his ancestor in favor of the personal representative of the deceased until the estate is settled."

We do not mean to say that the heir takes *en autre droit.* He does not. When the ancestor dies seized and the heir enters he becomes seized in his own demesne, and does not hold in the right of another. The descent is cast upon him through the exercise by the legislative department of the government of its plenary power over the subject of descents. The descent is never cast upon an administrator, and the reason why, upon a sale by an administrator a fee may be vested in a purchaser, if that be the estate of the intestate, is because the law makes that the result of the exercise of the statutory power of sale by the administrator, and not because the administrator has the fee or the estate which passes upon the exercise of the power.

We cannot think otherwise than that the administrator is not embraced within the language of the statute controlling partition. He is not either a joint tenant, a tenant in common or coparcener, nor do his rights and powers as to the real estate involve the right of partition. He did

not have such right at common law. Proceedings in partition are followed under the statute by a decree vesting in the several parties the title of the several portions or parcels of land allotted to them respectively. The right of the administrator is limited to a temporary possession for special purposes. The court cannot by decree properly vest in him any other estate than a simple possession, such as the law recognizes as his right, and while such qualified right to possession may enable him to sue in ejectment to recover possession, he does not have such an estate in the land as the statute contemplates and requires as the basis for a suit in partition.

The very interesting questions which arise in the construction of the will, which is the basis of this suit, have been twice the subject of our careful examination, but as the plaintiff neither has nor can have any right, legal or equitable, to a partition, and the proceeding must necessarily *absolutely* fail, we think any discussion of these questions improper.

The decree is reversed, and the case will be remanded with directions to dismiss the bill.

JOHN J. F. MITCHELL ET AL., APPELLANTS, VS. JOHN S. WAMBLE, APPELLEE.

When pending a suit in equity to enforce the specific performance of an agreement to convey lands, the principal defendant dies, the suit abates, and must be revived as prescribed by the rules and practice of the court against the legal representatives, before decree can be made in that suit directing a conveyance.

Appeal from the Circuit Court for Orange county.

Rule 38, referred to in the opinion of the court, is as follows:

"In all cases where the defendant in an equity suit shall

have died, the cause may be revived against his legal representative upon motion at any time by the plaintiff, and upon his filing a duly certified copy of the letters testamentary or of administration granted to the legal representative of the deceased defendant, and notice of such motion to the legal representative to show cause, if any he can, why the cause should not be revived against him, and thereupon the cause shall proceed in the same manner as if the suit had been instituted against such representative, or the defendant had not died. Or the legal representative of the deceased defendant may himself have an order reviving the cause on his motion, and notice thereof to the plaintiff or his solicitor, and upon his filing a certified copy of his letters testamentary or of administration, and the cause shall thereupon stand as if the death of the defendant had not occurred, or his representative had been originally sued."

The other facts are stated in the opinion.

H. C. Harrison for Appellants.

J. Wofford Tucker for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This was a suit in equity by John S. Wamble against John F. J. Mitchell, Sarah A. Watts and Joseph Leinhart to compel the specific performance of an agreement for the sale of land by Sarah A. Watts to Wamble. J. F. J. Mitchell is charged with certain transactions connected with the sale, and Leinhart as a subsequent grantee with notice. After answer and the taking of testimony it was suggested upon the record that Sarah A. Watts had died, and it was "ordered that Mrs. Henrietta Mitchell, wife of defendant, J. F. J. Mitchell, be and she is hereby made a party to this action; that a copy of this order be served on Henrietta Mitchell, and that this cause do proceed according to the

rules and usages of this court." A copy of this order was served on Mrs. Mitchell, who filed no answer and took no action in the cause, except to join in the appeal from the final decree. The court decreed that the deed to Lienhart was fraudulent and void, and that John F. J. Mitchell and Henrietta Mitchell, his wife, do convey to complainant the land described, and that they pay the costs.

The petition of appeal prays a reversal of the decree ordering them to convey.

We do not find in the record any evidence that Mrs. Mitchell was a proper party to the suit as an heir at law, or as an administratrix of the estate of Mrs. Watts. The bill states only that John F. J. Mitchell represented himself to be the agent of Mrs. Watts, "his mother-in-law." Possibly Mrs. Mitchell is the daughter of Mrs. Watts, but if that be so the suit was not revived as against any legal representative of Mrs. Watts.

Upon the death of a plaintiff or defendant materially interested, the suit, according to the former and the present practice, abates. 2 Dan. Ch. Pl. & Pr., 5 Am. Ed., 1508.

Rule 38. Equity Rules, provides for reviving a suit against the legal representatives of a defendant, but nothing appears to have been done in this cause to revive it after the death of Mrs. Watts, who held legal title (it is presumed), and who was charged with having agreed to convey the land to complainant.

As to Henrietta Mitchell, she appears to be a mere stranger to the entire transaction and to the property, and as to her husband, he could not convey, for no interest in the property appears in him. The record, therefore, shows no foundation for this decree, and it is reversed and the cause is remanded, with directions that the parties proceed according to the practice of the court.

Decree reversed.

CHARLES H. BROCK ET AL., APPELLANTS, VS. MICHAEL J. DOYLE ET ALS., APPELLEES.

1. A State Court is not bound to surrender its jurisdiction upon a petition for removal to the courts of the United States until a petition is filed, which, upon its face, shows the right of the petitioner to the transfer. In such petition it is not enough to allege that the petitioners were resident in another State. They must allege that they were citizens.
2. In a suit for partition, under the statute, process should be served upon a minor defendant before a guardian *ad litem* is appointed.
3. In partition it is not essential that the shares assigned to the several parties should be exactly equal, as the parties who receive more than their share of the estate may be required to make a pecuniary compensation to those who receive less.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion.

J. B. Stickney for Appellants.

J. W. Price for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In this case, a petition for partition by the respondents of real estate, in which it was alleged that the parties were tenants in common, a petition for removal of the cause to the courts of the United States upon the ground of prejudice and local influence, was filed after answer by defendants. This matter concerns the jurisdiction of the State court, and must be first disposed of. Under the act of Congress regulating the subject such a right is given under circumstances named therein, where the suit in the State court is between a citizen of the State in which it is brought and a citizen of another State.

The allegation in this petition is that the "petitioners re-

side in or near the city of Brunswick, in the State of Georgia." The Supreme Court of the United States has uniformly held that in such cases as this a State court is not bound to surrender its jurisdiction upon a petition for removal until, at least, a petition is filed which, upon its face, shows the right of the petitioner to the transfer. 5 Otto, 187.

The statement here does not amount to an allegation that the petitioners are citizens of the State of Georgia. In the case of Parker *et al.* vs. Overman, 18 How., 141, which was a case in which a removal was sought, it was held that in a partition for removal it is not enough "to allege that the petitioners were residents in another State." Say the court: "'Citizenship' and 'residence' are not synonymous terms." See also 8 Peters, 115. It is thus apparent in this case that the jurisdiction of the State court was not divested, and we have only to examine the proceedings of that court to ascertain whether there is therein error calling for a reversal of the orders made herein. This brings us to the consideration of the errors assigned by the appellants.

We have examined with care the several errors assigned, but it is necessary to the disposition of the case to refer to but one.

Charles H. Watson, one of the defendants to this suit, is a minor. Without any service of process upon him, or upon any one for him, the court, upon the application of his father, appointed C. H. Spencer his guardian *ad litem*.

The practice, under the statute regulating proceedings in partition, conforms to the general rules in chancery proceedings, except where otherwise provided in the statute. There is no provision as to service of process upon minor defendants. It is therefore controlled by the general rule in chancery, which is that "in a suit against an infant process should be served upon him, and a guardian *ad litem*

appointed by the court." 1 McLean, 167; 1 Ala., 390; 6 J. J. Mar., 45; Daniel Chy. Prac., 5 Edition, Note 1, §161.

It is thus apparent that the order for the sale, affecting as it does the interest of the minor defendant, must be set aside, and the case remanded to stand upon the last amended petition. Upon the service of the statutory process upon the minor, the cause will proceed in accordance with the rules of practice controlling the subject.

We notice from the testimony as to the propriety of an actual partition rather than a sale of the land, that the view seems to have prevailed with all the parties that an actual partition must be of such character as to give one-third in quantity of the land to the parties seeking the partition. We think such a view if entertained is error. This proceeding is substantially a proceeding in chancery under the statute. The rule there is, that it is not necessary that the shares assigned to the several parties should be exactly equal, as the parties who receive more than their share of the estate may be required to make a pecuniary compensation to those who receive less. 2 Paige, 27.

In this aspect of the case this enquiry, if it is desired by the defendants, shoud be made, and they should be permitted to take testimony upon the subject. If such a partition as this cannot, in the opinion of commissioners to be appointed, be made without "great prejudice" to the owners of the estate, as a matter of course a sale should be had.

The order of the sale is set aside, and the case will be remanded for further proceedings, conformable to law and not inconsistent with this opinion.

E. D. P., APPELLANT, VS. THE STATE, EX REL., G. O., APPELLEE.

1. In a complaint under the law relating to bastardy, it should be stated, affirmatively on oath, that the mother of the bastard child is a single or unmarried woman. The recital by the magistrate is not sufficient.
2. The act relating to bastardy requires a sufficient complaint to be made before a Justice of the Peace, and the Circuit Court can ob tain jurisdiction only in the manner prescribed by law.
3. The remedy in cases of bastardy is a special proceeding provided by law, and the acts relating to amendment of pleadings, do not apply to the amendment of a complaint so as to make a case not stated in the complaint before the Justice.

Appeal from the Circuit Court for Clay county.

The facts of the case are stated in the opinion.

Fleming & Daniel for Appellant.

S. Y. Finley and *R. W. Davis* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Complaint was made before the County Judge of Clay county as follows:

"Personally appeared before me, Wm. Peeler, County Judge, and *ex-officio* Justice of the Peace in and for said county, G. O., a single woman, who being duly sworn says, that she accuses P. of being the father of a bastard child of which she was delivered on the 27th June, 1878, in the county aforesaid,the same being a female child, to wit, in the county aforesaid." She therefore prays a warrant for his arrest, &c. This was signed and sworn to, and a warrant was issued.

The record does not disclose whether an examination was had before the magistrate, as directed by the statute,

but defendant being arrested executed a bond with sureties for his appearance at the Circuit Court. The defendant, at the term of the Circuit Court, moved to dismiss the proceedings on the ground that there was no examination before the magistrate, and it did not appear that the magistrate found that sufficient cause appeared to hold the accused to answer, and upon the further ground that the complaint did not set forth on oath that the complainant was a single woman, and that it is therefore insufficient.

The court overruled the motion. The next day a new complaint was presented, signed by the attorney for the relator and sworn to by her, and appears among the files.

Thereafter, on motion of complainant's counsel, an issue was made up by the court, and the cause tried before a jury, who rendered a verdict against the defendant upon the issues and judgment entered thereon, a motion for a new trial having been overruled. Defendant appeals.

The proceedings relating to the maintenance of bastard children are regulated by statute, and are in the form of proceedings in criminal cases, the judgment sought being the indemnity of the complainant and the public against the expenses of maintaining such children. It is not strictly a proceeding for the punishment of crime, nor is it a civil action between parties, but is essentially a special proceeding, the form and method of coercive warrants and arrest being employed to secure the personal attendance of the accused and the exaction of security in case the complaint is sustained.

The making of the complaint and the holding to trial by the magistrate are the statutory means by which the Circuit Court obtains jurisdiction to try the cause and render judgment. There is no other method of obtaining such jurisdiction.

If the complaint upon which the warrant was issued does

not contain sufficient statement of facts to make a case before the Circuit Court for trial, the case should be dismissed from that court. An amendment to the complaint, by charging on oath facts not sufficiently or substantially charged before the magistrate, cannot be allowed by the Circuit Court, because the statute does not authorize an original complaint to be made in the latter court, and such an amendment is an original complaint. In other words, if the original complaint was insufficient, the warrant of arrest is unauthorized, and the accused should not be held under it. Counsel for appellee insist that the statutes relating to amendment of pleadings in civil cases (Th. Dig., 332, Sec. 2; Act of 1861, Ch. 1096, Sec. 74,) are applicable, and that this is a case of mere amendment of pleadings. We think that these statutes do not apply for reasons already stated. The authority to issue the warrant and hold the defendant to a trial depends upon the validity of the complaint before the Justice.

On examining the complaint it is found that it omits the essential statement on oath of the fact that the complainant is a single or unmarried woman. She states that "she accuses" the defendant "of being the father of a bastard child of which she was delivered," but the statute authorizes this proceeding only when the complainant is a "single woman," and this fact she does not state on oath. It is true the magistrate recites that the complainant, "a single woman," being duly sworn, says, &c. This is the statement of the magistrate and not of the complainant.

No perjury can be assigned upon this statement of the officer, because it is not a fact stated on oath.

The complaint, therefore, was not sufficient in its statement of facts to authorize the issuing of warrants and it should therefore have been dismissed.

It is not necessary to examine other questions presented.

The judgment is reversed and the Circuit Court must dismiss the complaint.

WM. C. OVERBY, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. A keno table is a gaming table, but the keeper of one cannot be punished under the law of 1839, (Thomp. Digest, 500, 1,) for the reason that the Legislature of 1879, Chapter 3099, has legalized it by requiring a license for such table.
2. The Legislature did not intend to punish criminally any of the acts licensed by its authority, especially when such acts were made the source of a portion of the revenue of the State.

Writ of Error to the Circuit Court for Duval county.

Section 11 of Chapter 3099, referred to in the opinion, provides that "no person shall engage in or manage the business, property or occupation mentioned in this section, unless" the license tax be paid to the Collector of Revenue and license issued by the Clerk of the Circuit Court, as provided therein. The amount of a "keno" license is specified as set forth in the opinion.

The other facts are stated in the opinion.

T. A. McDonell for Plaintiff in Error.

The Attorney-General for The State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

On the twenty-eighth day of May, A. D. 1880, the grand jury of Duval county presented an indictment against the defendant, William C. Overby, for keeping a common gaming house. Such indictment charged that the defendant

"unlawfully did keep and maintain a certain common gambling house, to-wit: in the City of Jacksonville, in said county, and in Ledwith's block, on Bay street, in said city, and in the said common gaming house, for lucre and gain, on the day aforesaid, there unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come to play together at a certain game called 'keno;' and in the said common gaming house, on the day and year aforesaid, there unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain, playing and gaming at the said game of 'keno' for divers, large and excessive sums of money," &c., &c.

To this indictment the defendant plead not guilty. On trial the jury found him guilty, whereupon his attorney moved the court to "arrest the judgment, vacate the verdict, and grant a new trial" on the following ground:

1st. That the indictment in said prosecution, upon which the defendant was tried and convicted, does not set up facts sufficient to constitute an offence against the laws of the State of Florida.

2d. That said indictment discloses on the face thereof that the supposed offence, for which the defendant was tried and convicted, is made lawful by the statute of the State of Florida.

3d. That the verdict was contrary to the evidence.

4th. That there was not sufficient legal evidence to justify the verdict.

5th. That the indictment is vague, uncertain, and bad for duplicity.

The motion was denied by the court, and the defendant took an exception.

A bill of exceptions was made up, and this case is here on writ of error.

The indictment was found under an act of the Legisla-

ture of 1839, (see Thompson's Digest, page 500, §13,) which provides that "if any person, by himself or herself, servant or other agent, shall keep, have, exercise or maintain a gaming table or room, or any house, booth, tent, shelter or other place for the purpose of gaming, or in any place of which he or she may have the charge, control or management, procure, suffer or permit any person or persons to play for money or other valuable thing or things, or to bet or wager on such as may play for money or other valuable thing or things, at any game whatsoever, he she or they so offending may be indicted," &c.

Were this the only statute of this State upon the subject, we should have no hesitation, under the evidence furnished in the bill of exceptions, in holding that the finding of the jury was correct, and in sustaining the judgment. "Keno" has frequensly been held to be a gaming table, and coming within the statutes provided against keeping gaming houses and gaming tables. In the case of Miller vs. The State, 48 Alabama, 122, the court, in their opinion, say: "Wherever a game is kept or exhibited by one person, who is said to *run the game*, who is the conductor of manager and presides over the same, and it is carried on by means or instruments, as in this case, by a wheel, balls, cards, &c., that necessarily require the use of a table, or something in the place for it, and is kept or exhibited that third persons may gamble at it, whatever be its name or description, it is a table for gaming, or gaming table, within the meaning of section 3621. * * * We therefore decide that the game called keno, as it was kept and exhibited in this instance, is to be regarded as a table for gaming."

In the case of Trimble vs. the State, 27 Arkansas, 355, the court in discussing the statute of that State prohibiting

the keeping or exhibiting gaming tables, or gambling devices, &c., use this language:

"The design of the statute was to suppress all such institutions, and we may safely say that no gambling table or device has ever been invented by man that is more pernicious in its influence than that of *'keno.'* It is very simple, a child can learn it as well as a grown person; this very simplicity is what renders it so dangerous to the laboring man or mechanic, who having a few dollars in his pocket wishes to try his luck, and not having time to learn the principles of other games, trusts blindly to 'keno.'"

The conclusion to which the court in that case came wast that the game called and known as "keno" is a game a- which money or property may be won or lost, and is a gam ing device.

In the case at bar the bill of exceptions shows that at the time and place mentioned in the indictment, the defendant kept, maintained and exercised a gaming table and room, upon which table the game of "keno" was nightly played; that in such room there were from ten to fifteen tables used and employed by the players in playing the game of "keno;" that the persons playing such game bet and hazarded certain sums of money which went into a pool, less ten per cent., which ten per cent. went to the defendant, the keeper of the room and table, and the successful player who had won or kenoed on such chance game took all the money which had been so staked and bet on the chance of winning; that the game is a game of chance and hazard, and upon the betting of which money is lost or won; that during the times mentioned in the indictment persons to the number of from five to fifty would nightly assemble at such room and engage in the playing

of such game of "keno" for the purpose of winning money.

This evidence adduced upon the part of the State on the trial of this cause and appearing in the bill of exceptions justifies the opinion of this court that it is a gambling game, not played for recreation or amusement but played for the sole purpose of winning or losing money, and comes clearly within the provisions of the statute above cited.

But the defendant justifies under what he claims to be a license under Section 11 of the Laws of 1879, Chap. 3099. Sub-division second of Section 11 provides: "Keepers of billiard tables, bowling alleys or skating rinks, when such tables, alleys or rinks are kept for other than private use, shall pay in each county, and for each table, alley or rink, a license tax of fifteen dollars; and all keepers of keno, or pool tables, or wheel of fortunes, shall pay in each county a license tax of one hundred dollars for each table or wheel." The term "license tax," as used in this section, is undoubtedly intended to mean the amount paid for the purpose of procuring a license which is to be issued by the Clerk of the Circuit Court, under the seal of the county "on filing the receipt of the collector for the necessary amount therefor," &c., as is provided by section thirteen of the same act. Under this section, it is claimed, the defendant procured a license to keep a keno table, and introduced a paper under seal of the county of Duval, which was received as evidence, and which seems to have been treated by the court and all parties as a license without exception or objection. That paper is in the following words and figures: "No. 774, Jacksonville, Fla., April 23, 1880, State and County License. Received of W. C. Overby one hundred and fifty dollars for State and county licenses for the

year ending December 26, 1880. Occupation keno. State license, $100; county, $50; clerk's fees, 25.

"HENRY L'ENGLE,

"Collector of Revenue Duval county.

"Countersigned and recorded by

"T. E. BUCKMAN,

"[SEAL.] Clerk of Court of Duval county."

If this paper, which is simply a receipt for the amount of the State and county license tax, signed by the Collector and countersigned by the Clerk of the Circuit Court, is conceded to be a license, then this defendant was justified in keeping one keno table under the said second sub-division of section eleven of the "Act for the Assessment and Collection of Revenue," passed in 1879. We do not determine as to the validity of this paper claimed to be a license, as no question was made upon the trial on that ground, and for the further reason that section 12 of the same statute provides the punishment to be inflicted upon the person carrying on such business or profession without such license. This section provides as follows: "Any person or persons who shall carry on or conduct any business or profession for which a license is required, without first obtaining such license, shall, except in such cases as are otherwise provided for in this act, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than double the amount required for such license."

The Legislature by this act of 1879 legalized this game of "keno," and made it, by the license tax imposed, a source of revenue to the State, remvoing the inhibition upon it as a gaming table provided by the statute of 1839. We cannot believe that the Legislature would, or intended to punish criminally any of the acts licensed by its authority, and which it made the source of a portion of its revenue Chiles vs. The State, 1 Texas, Ct. of Appeals, 27;

Houghton vs. The State, 41 Texas, 135; The State vs. Johnson, id., 504; Rodgers vs. The State, 26 Ala., 76.

It will be seen, however, by the 12th section of the act of 1879 as above quoted, that there is a penalty imposed for the carrying on of any business so to be licensed, when no license has been taken out. We must consider that the act of 1839, in so far as "keno" tables are concerned, has been amended by the revenue act of 1879, and that therefore the defendant was not guilty of the offence charged in the indictment, and the judgment of the court below must be arrested.

WM. HAZEN, PL'F IN ERROR, VS. THE STATE, DFT. IN ERROR.
C. J. BLADE, PL'F IN ERROR, VS. THE STATE, DFT. IN ERROR.
HENRY BOHLEN, PL'F IN ERROR, VS. THE STATE, DFT. IN ERROR.

Persons keeping and running "keno" tables without having procured a license and paid a license tax are guilty of a misdemeanor, and should be punished, on conviction, by a fine, as is provided in Section 12 of Chapter 3099 of the Laws of 1879.

Writs of Error to the Circuit Court for Duval county.

The facts are stated in the opinion and in the preceding case of Overby vs. The State.

T. A. McDonell for Plaintiffs in Error.

The Attorney-General for The State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

These three cases are here upon writs of error, the defendants having been severally indicted under the gaming law of 1839 (Thomp. Dig., 500, 1,) for keeping a keno table,

the errors assigned in each individual case being the same as assigned in the case of "The State of Florida vs. William C. Overby," decided at this term of this court. They all justified under the one license issued to the said William C. Overby, and numbered 774.

The evidence shows that they were copartners of the said Overby, and that they all occupied the same room in the City of Jacksonville, each having a different table. The law under which they were severally indicted provides that a license should be taken out for each table. We have, however, held that the law of 1839 was amended by the law of 1879 so as to legalize the playing of "keno," and that the person or persons running such game must procure a license and pay a license tax. If they do not so procure a license they are guilty of a misdemeanor, and, upon conviction, should be punished by a fine, as provided in §12 of Chapter 3099, Laws of 1879.

For the reasons assigned in the case of The State vs. Overby these three several judgments must be arrested, and such is the order of this court.

STATE OF FLORIDA, PLAINTIFF IN ERROR, VS. DENNIS BURNS, DEFENDANT IN ERROR.

The State is not entitled to a writ of error to reverse the judgment of the Circuit Court quashing an indictment and discharging the accused.

Writ of Error to the Circuit Court of Escambia county.

The offense with which the accused was charged was discharging and depositing in the waters of Pensacola bay ballast contrary to the manner prescribed by law.

Appeals were entered by the State Attorney, Mr. McKinnon, and the records sent up in this and other cases.

The appeals were dismissed on the same grounds.

The other facts are stated in the opinion.

S. R. Mallory and *W. A. Blount* for the motion.

The Attorney-General contra.

THE CHIEF-JUSTICE delivered the opinion of the court.

The defendant in error, Dennis Burns, was indicted, and upon his motion the indictment was quashed.

The State thereupon seeks to bring the cause before this court by writ of error, and defendant in error moves to quash the writ and dismiss the case upon the ground that a writ of error will not lie at the instance of the State in a criminal cause.

The statutes of this State make provision for the writ of error in criminal cases, but in every act of legislation on the subject it is clearly contemplated that the defendant only is entitled to the writ, and only after conviction.

In New York there were several instances prior to 1848, in which writs of error were prosecuted by the law officer of the State, but in none of the cases reported was the question made or considered by the court whether the people could properly review or reverse a judgment in favor of an accused person. In The People vs. Corning, however, (2 Comst., 9,) in a thorough examination of the question, the Court of Appeals held that the people could not prosecute the writ. In 1852 the Legislature of that State authorized it in cases where judgment in favor of the accused was given upon an indictment, except where there had been an acquittal by a jury, and in Arkansas the State is expressly authorized to bring error. (1 Pike, 428.) It was also held in Maryland that the State might bring error. (5

Har. and John., 317.) In all other States the right of the State to the writ is denied.

The weight of authority is overwhelming, not only in this country but in England, that the writ will not lie at the instance of the State, and it is evident from the character of the legislation on the subject in this State that it has never been contemplated that the State could further pursue parties who had obtained judgment in their favor in prosecutions by indictment, whether by the judgment of the court or verdict of a jury.

The writ of error is dismissed.

GEORGE J. ALDEN, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. In an indictment against an officer of a corporation for embezzlement of the property of such corporation, the corporate name as fixed by law should appear in such indictment as the owner of the property, and the name of office of such officer as prescribed by law should be truly set out therein.
2. Judgment will be arrested when it appears that there is a misnomer in either the name of the corporation or in the title of the officer of the corporation so charged with embezzlement.
3. Indictments to be valid should be properly endorsed, as is provided by statute, (Thomp. Dig., p. 522,) either "a true bill" or "not a true bill," together with the name of the foreman of the grand jury.

Writ of Error to the Circuit Court for Volusia county.

The facts of the case are stated in the opinion.

E. K. Foster and *John W. Price* for plaintiff in Error,

The Attorney General for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

At the Spring Term of the Circuit Court, held in and for Volusia county, in the year one thousand eight hundred and seventy-eight, the grand jury found an indictment against the plaintiff in error, the charging portion of which is as follows: "The grand jurors of the State of Florida, enquiring in and for the body of the county of ————, upon their oaths do present that George J. Alden, late of the county of Volusia aforesaid, in the circuit and State aforesaid, laborer, on the first day of October, in the year of our Lord one thousand eight hundred and seventy-six, with force and arms at, in the county of Volusia aforesaid, the said George J. Alden being then and there Superintendent of Public Schools and Secretary of the Board of Public Instruction in and for the county of Volusia aforesaid, the said Board of Public Instruction being a corporation then and there duly, legally established, organized and existing by virtue of the laws of the State of Florida, did, by virtue of his said office of Superintendent of Public Schools and Secretary of the said Board of Public Instruction as aforesaid, and while the said George J. Alden was employed in his said office of Superintendent of Public Schools and Secretary of the Board of Public Instruction, have, receive and take into his possession certain property, to-wit: school-books of the value of three hundred dollars of the goods, chattels and property of the said Board of Public Instruction, and the said school-books then and there unlawfully, fraudulently and feloniously did embezzle," &c.

The counsel for the defendant moved to quash this indictment for several reasons, among which are the following: "The record of the court does not show that the grand

jury has ever brought in any true bill of indictment against the defendant at said term of court."

"Because there is no such office in the State of Florida or county of Volusia as County Superintendent of Public Schools, named and described in the indictment as the officer who received the money charged to have been appropriated."

The motion was overruled, and the counsel for the defendant excepted.

The cause was tried, and the defendant was found guilty, whereupon his counsel made a motion in arrest of judgment, assigning many reasons, among which are the following:

Because the court refused to quash the indictment on a motion heretofore made, and also because there is no such office known to the law as the one named in the indictment, and by which the defendant is described.

The court overruled the motion, the counsel excepted, and the case is here on writ of error.

In the year one thousand eight hundred and sixty-nine the Legislature enacted a law entitled "An act to establish a uniform system of common schools and a university." (Laws, 1869, Chapter 1686.) Section 2 of this act provides that "the officers of the department of public instruction shall be a Superintendent of Public Instruction, a State Board of Education, a Board of Public Instruction for each county, a *Superintendent of Schools* for each county, local School Trustees, Treasurers and agents." It establishes the State Board of Education, providing that it shall consist of the Superintendent of Public Instruction, the Secretary of State and the Attorney-General, the Treasurer of the State being made the Treasurer of the Board. It is made a corporate body, with full power to perform all corporate acts for educational purposes. By section 14 it is enacted that "each Board of Public Instruction is hereby constituted a

corporate body by the name of 'The Board of Public Instruction for the county of———, State of Florida,' and in that name may acquire and hold real and personal estate," &c. This statute further provides in section 17 that "*the County Superintendent of Schools* shall be Secretary and agent of the Board."

The indictment charges that the defendant, by virtue of his office of "Superintendent of Public Schools and Secre- of the Board of Public Instruction in and for the county of Volusia aforesaid, the said Board of Public Instruction being a corporation then and there duly, legally established, organized and existing by virtue of the laws of the State of Florida," did unlawfully, &c., embezzle certain school-books, the property of such Board of Public Instruction. The title of this corporation is fixed and determined by law as "The Board of Public Instruction for the county of Volusia, State of Florida." The title of the officer is also determined as "Superintendent of Schools." It is true the same act speaks of this officer as County Superintendent of Schools, making him Secretary and agent of the Board, but nowhere in such act is he designated as "Superintendent of Public Schools," nor is the corporation mentioned as "The Board of Public Instruction in and for the county of Volusia aforesaid." There is no such corporation known to the law as the one described in this indictment, which it is claimed was the owner of the school-books alleged to have been embezzled, nor is there any officer of said corporation known to this law bearing the title of "Superintendent of Public Schools and Secretary of the Board of Public Instruction." There is clearly a misnomer of the corporation which it is alleged the defendant defrauded, as well as a misnomer of the officer of that corporation, the defendant himself. By an examination of the statute books of the State the true name of both corporation and officer

could have been discovered. Commonwealth vs. Pope, 12 Cushing, 272; Mathews vs. The State, 33 Texas, 102; 1 Bishop C. P. §682; The State vs. Waters, 3 Brev., 507.

Though this error is fatal, and warrants the arrest of the judgment, we will call attention to one other error.

The statute of this State (Thomp. Dig., p. 522,) directs that "all indictments shall be signed by the prosecuting attorney, and endorsed on the back by the foreman of the grand jury, when so found, 'a true bill,' and when not found 'not a true bill,' signed by him," &c. The indictment before us is properly signed by the prosecuting attorney, but there is no such endorsement as is required by that statute anywhere upon it. Neither the words "a true bill," nor the name of the foreman of the grand jury, or the date of its filing by the clerk, appear in or upon the indictment.

Other errors are assigned, arising upon exceptions taken on the trial, which it is not now necessary to notice, as the judgment must be arrested for those above considered.

Judgment arrested.

AUGUSTUS S. PENDRY, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

A judgment on an indictment for obtaining property under or by reason of false pretenses, which indictment does not contain an allegation that the party was induced to part with the ownership of the property by reason of the alleged false pretenses, will be arrested.

Writ of Error to the Circuit Court for Orange county.

The facts of the case are stated in the opinion.

Thomas E. Wilson, E. K. Foster, John A. McDonald for Plaintiff in Error.

The Attorney-General for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

On the 29th day of May, A. D. 1880, the grand jury, sitting in and for Orange county, presented an indictment against the plaintiff in error for obtaining property under false pretenses. The substance of the charge, as alleged in such indictment, is that the plaintiff in error "unlawfully, knowingly and designedly did falsely pretend to one Fannie L. Medlin that she, the said Fannie L. Medlin, was indebted to the steamer Okehumkee in the sum of $8.90 for freight to the said Augustus S. Pendry, being the agent of said steamboat claiming authority to collect the amount due for freight, by means of which false pretense the said Augustus S. Pendry did then and there unlawfully obtain from the said Fannie L. Medlin the sum of $8.90 of the money and property of the said Fannie L. Medlin, with intent then and there to cheat and defraud the said Fannie L. Medlin of the sum of $3.90; the truth and fact being that the said Fannie L. Medlin did not owe the steamboat Okehumkee $8.90 for freight, but only the sum of $5.25, as the said A. S. Pendry then and there well knew," &c.

The counsel for the defendant moved to quash the indictment so found, and assigned the following reasons therefor:

1st. That there is no averment to falsify the matter of the pretenses set out in the indictment by which it can appear to the court that any of the pretences alleged were false.

2nd. That the indictment not being for a fraud at common law, there must be some token set up in the indictment besides the bare assertion of the defendant charged to have been used by him in order to effect his fraudulent intent,

such as common prudence would not be sufficient to guard against.

3d. That the indictment is not drawn in conformity with the statute.

4th. That the indictment does not charge that the money was feloniously and designedly obtained.

5th. That the offence, as charged in the indictment, is not indictable at law.

The motion was denied, the defendant plead not guilty, was tried by a jury and convicted. A motion was made for a new trial, which was denied, and then a motion in arrest of judgment, which was also denied.

It appears by the bill of exceptions that exceptions were duly taken on part of the defendant to some portions of the evidence on the trial, to certain portions of the charge of the court, and also to the refusal of the court to charge as requested by the counsel for the defendant.

Seventeen errors are assigned, the first of which is that the court overruled the motion to quash the indictment. This motion should have been granted, and the indictment quashed. The case of Ladd vs. The State, 17 Fla., 215, and the cases there cited, dispose of this case on that ground. It nowhere alleges that Fannie L. Medlin believed the alleged pretenses, or that she parted with her money in consequence of her belief in said pretense, or that she was in any way deceived thereby. It contains no averment that Fannie L. Medlin was induced to part with the ownership of her property by reason of the alleged false pretenses. It is not necessary to examine the other errors alleged, as this disposes of the case.

The judgment must be arrested. It is so ordered.

EX-PARTE DENNIS EAGAN.

1. While it is within the jurisdiction of this court, under the statute, (Chapter 3129, Laws,) to award a *habeas corpus* and have a preliminary examination of a party arrested after affidavit and warrant, and discharge, commit to bail or remand into custody, still, the general rule is that this court should, under such circumstances, remand the party to the custody of the sheriff to be delivered to the magistrate issuing the warrant.
2. While in such case an affidavit of the party that he has reason to believe, and does believe, that he cannot get a fair examination or secure justice before such magistrate, coupled with the fact that two persons, charged with the murder with the aiding and abetting of which the prisoner is charged, and deemed by him to be essential witnesses, are confined in the jail of the county in which this court is sitting, are not deemed sufficient grounds upon which this court would have such examination; still, if the ground of the alleged belief be on account of alleged prejudice against the party, and the Attorney-General for the State consents to such examination on the ground that it will "save great expense to the State of Florida," this court will make such examination, and the testimony of witnesses may, in such case, by consent, be taken before a commissioner.

The petition for a writ of *habeas corpus* was filed in the Supreme Court February 15, 1881. The writ issued on same day, returnable before the court.

The petition represents that petitioner, Dennis Eagan, is confined in the county jail of Leon county by Alexander Moseley, sheriff of such county, without authority of law; that petitioner is informed that he is held under a warrant issued by one Witherspoon, a Justice of the Peace of Madison county, upon the charge of aiding and abetting the commission of a murder; it denies that he is giulty of any crime as alleged. The other allegations of the petition are stated in the opinion. It prays a writ of *habeas corpus* and an investigation by this court of the whole charge. Mr. Moseley, the sheriff, made return that he held under the

said warrant. The warrant, a copy of which accompanies the return, recites that affidavit has been made that on February 8, 1881, Charles Savage murdered Frank Paterson in Madison county, and that Eagan and one Howard E. James were feloniously present, assisting, aiding and abetting said Savage in the said murder. The warrant is endorsed by a Justice of the Peace of Leon county.

E. M. Chency and *P. W. White* for the Petitioner.

Under the act of 1879, Chapter 3129, the writ of *habaes corpus* may issue at any stage of the proceedings after the detention of the petitioner under any process, and the court has original jurisdiction to inquire into all matters relating to such detention. Act of 1879, Chap. 3129, Secs. 1, 5, 6 and 7.

Having acquired jurisdiction, the court can determine every question arising in relation to the subject-matter. Hurd Hab. Cor., 331.

"The writ of *habeas corpus* is designed as a searching and inquisitorial process, and undoubtedly may be issued by a court of appellate jurisdiction, on sufficient showing, *at any period of the prisoner's confinement.*" Hurd Hab. Cor., 333, 4 and 5.

The writ may issue before examination, and the court thereupon has power to pursue any course which the circumstances warrant. Krans' Case, 1 Barn. & Cres., *257; 26 Wend., 192; 4 Bacon's Abr., 576. Dr. Burns' Observations. In Krans' case, above quoted, the court recognized the power of examination before commitment, but declined to exercise it under the circumstances of that particular case.

Under the *habeas corpus* act of 1879, the Supreme Court, or the Judges thereof, can exercise all the powers of a committing magistrate. Exp. Harfourd, 16 Fla., 286.

The power of the court, under the writ of ***habeas corpus,*** to inquire into all the circumstances of the case is unlimited, except by its own discretion, and should be exercised to secure to the prisoner a fair hearing. Hurd Hab. Cor., 288.

Inquiry under *habeas corpus* may be made upon an arrest upon a mere warrant either before or after the commitment or indictment. Hurd Hab. Cor., 148; Street vs. State, 43 Miss., 17; Prime's Case, 1 Barb., 340.

"There has been a decided repugnance against making the writ less remedial than it was at common law, and the tendency has been in such cases to give the hearing on *habeas corpus* the character of an ***original examination.***" Hurd. on Hab. Cor., 337.

Power under *habeas corpus* is to be exercised with reference to all the circumstances of the case. Hurd Hab. Cor., 347; Jurisdiction, Hurd Hab. Cor., 364; Jurisdiction Com. Law, Hurd, 415.

The authorities cited above seem to show conclusively—

I. That the Supreme Court, both under the common law and the statutes of this State, possess ample power under the writ of *habeas corpus* to exercise original jurisdiction over all matters relating both to the cause and manner of the detention of any person detained in custody charged with a criminal offence, and as the statute limits the inquiry to no particular form of process or cause of detention, it must extend to all.

II. That the extent to which the court shall exercise this power is a question entirely within the sound discretion of the court itself, depending upon the circumstances and necessities of each case; the court pursuing such course as the interest of the public, the ends of justice and the rights of the petitioner may require.

The main question in this case then is: Can the interest of the public, the ends of justice and the rights of the pe-

tioner best be subserved and protected, by remitting the examination to the magistrate who issued the warrant or can they best be subserved and protected by an examination before this court? What is the wisest and best course to pursue for the State and for the petitioner?

The petition shows upon its face that the petitioner cannot obtain a fair examination before the magistrate who issued the warrant.

There is no law of the State which authorizes the transfer of the case by any proceeding to any other magistrate; and therefore unless the matter can be brought on an investigation had upon *habeas corpus* before another court, the petitioner is entirely without remedy.

The petition shows that two important witnesses for the petitioner are now confined in the jail in this city, and, though not stated in the petition, it is a matter of public notoriety that these witnesses could not be taken to Madison without great difficulty and expense to the State. Either then the State must be put to a great expense and inconvenience to facilitate an object which might be as well accomplished here, or the prisoner must be deprived of important witnesses in the examination.

The statute of 1879 evidently intends to confer upon both the Supreme and Circuit Judges, under the writ of *habeas corpus*, all the original powers of committing magistrates, and no other reasonable construction can be placed upon its various provisions. The object was to give these courts concurrent jurisdiction, or either to enable them to assume jurisdiction to the exclusion of inferior magistrates whenever the ends of justice and the interest of the public require such action.

John F. White, State Attorney of the Third Circuit, and *George P. Rainey*, Attorney-General for the State.

21 How. Prac., 85; see Sec. 113, p. 904, Vol. 6, U. S. Digest, 1st Series; Belgard vs. Morse, 2 Gray, 406.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The petition in this case discloses that the petitioner has been arrested under a warrant by a Justice of the Peace after being charged upon affidavit with feloniously aiding and abetting the murder of Frank Paterson. No preliminary examination by the magistrate issuing the warrant followed its issuance. The petitioner here seeks an examination and proper order at the hands of this court.

The first question which it is suggested arises concerns the jurisdiction and power of the court. We have examined this question. We have no doubt of our power, under the statute of this State, to hear the evidence, and to commit, admit to bail or to discharge, as the facts may justify. In a case of this character, however, the exercise of this power is discretionary. The general rule, we think, would require us to commit the petitioner to the custody of the sheriff of this court, with directions that he be taken before the magistrate for the purpose of investigating the charge. Ex-parte Krans, 1 Barn. & Cress., 258. This rule, however, is subject to the exception that the court may, in its discretion and for good cause shown, have the examination itself. It is suggested by petitioner that the petition here discloses good cause, in that it is alleged that he has reason to believe, and does believe, that he cannot get a fair examination, or secure justice, before the said Justice of the Peace in Madison county, and also because Charles Savage and H. James, two important witnesses of petitioner, are now confined in jail in Leon county, having been removed here for safe-keeping under the charge of

murder which it is alleged petitioner is charged with aiding and abetting.

We cannot, in view of the results which must follow in the matter of the exercise of their jurisdiction by magistrates, establish the rule that upon the simple affidavit by a party arrested of reason to believe, and actual belief, that he will not get justice before the magistrate, we will arrest the exercise of his constitutional power and functions. To do so would be to establish a precedent which would practically destroy his power as a committing magistrate. The party should at least show by affidavit or otherwise some good reason for his belief, some good cause for this court, contrary to its general rule, to supersede the jurisdiction of this officer, and assume to ourselves functions which, under the Constitution and the general legislative policy of the State, belong to another. Nor do we think the fact alleged as to the two witnesses sufficient. Under proper process of law, their testimony, if admissible, may be had before a proper magistrate. Again, from the nature of this case it is more than probable that persons, other than those charged with the crime, witnessed whatever occurred, and if this be true there must be witnesses for the State, resident in Madison county, to be brought here. We cannot see from the pleadings before the court that there is any greater reason why the two witnesses for the petitioner should not be carried to Madison county rather than the witnesses for the State should be brought here. We think this is a matter to be controlled to a great extent by the officers representing the State in this cause, and their views would very properly influence our action to a considerable degree.

Upon the present pleadings we must remand the case to the magistrate for investigation.

After the foregoing opinion was delivered, Mr. John F. White, State Attorney, and the Attorney-General, seeing that great expense would be saved to the State by having the examination before the Supreme Court, determined for this reason to consent to its proceeding with the case, and the Attorney-General so announced in open court, and the court thereupon decided to hear the case; and by consent of counsel for the State and the petitioner an order was entered authorizing John M. Beggs, Clerk of the Circuit Court for Madison county, to take the testimony of certain witnesses residing in that county, and report the same to this court.

The following testimony was taken by Mr. Beggs in Madison county; State Attorney John F. White, representing the State, and Mr. P. W. White, representing the petitioner, being present:

C. W. Stephens being sworn on behalf of the petitioner says: I live in Madison, Madison county, Fla.; I am an attorney-at-law; I know Dennis Eagan; I was in Madison on Tuesday the 8th February, 1881; I was with Mr. Eagan part of the morning of that day; Mr. Eagan was acting as Notary Public in taking testimony in the case of Bisbee vs. Finley; Mr. S. Y. Finley and myself represented Mr. Finley in taking testimony; one witness had been examined and cross-examined,and another witness was just called to go on the direct examination when Mr. Eagan said we would not take any more testimony here; I think this occupied about three-quarters of an hour; Mr. Horatio Jenkins was representing the contestant, Mr. Bisbee; Mr. Eagan was recording the testimony, and I was also taking a copy of the testimony: there was firing of pistols in the far end of the room; I presume caused him to get frightened and desist; I was sitting with my back towards the firing when I first heard it on the east side of the table

next to the door; Mr. Finley was sitting on the same side of the table on my right; Mr. Eagan was sitting opposite me on the other side of the table with his face to the door, when we began taking testimony; Mr. Jenkins was sitting at the north end of the table with his face towards us; the witness who had been on examination was a little to the left of Mr. Jenkins, about east of the north end of the table; the remark made by Mr. Eagan, that he would take no further testimony, was after the shooting was over and I had gone down and returned to the court room; Mr. F. P. Paterson came in the room whilst we were taking testimony, and sat down by me, and I did not notice when he got up and left me; it was about fifteen or twenty minutes after he came in until the shooting occurred; while sitting by me I think he was reading some testimony that was taken the day before on the Eagan plantation in the same case, or rather a copy of some testimony; I did not see the commencement of the shooting; immediately after hearing reports of the pistols in quick succession I jumped up and saw Howard E. James and Charles H. Savage and F. P. Paterson all together near the door of the court room; I saw Paterson as though he seemed to be pulling off from the two negroes, Savage and James; I left my seat and ran towards them as fast as I could; by the time I got there Mr. Paterson had fallen and gotten up again; I had to look where I was going, as I was jumping from one bench ot another to get to where they were standing, and made some noise going over benches; Savage was standing about six or eight feet from the door in the court room; I had heard distinctly three reports of a pistol before I got to them; when I was on the last bench, about five feet of Savage, who was in front of me, he leveled his pistol at me and said, "don't you come here;" I said, "don't you shoot me, sir," and immediately jumped off the bench and went

to Mr. Paterson, who had just gotten up; I asked him, "what is the matter, Frank;" he answered, "I am shot," I then asked him if he was hurt much; he answered, "yes, I am killed," and put his left hand up to his breast; we then walked by Savage and James, and I assisted him down stairs, where he got on a bed in a room down stairs; I then immediately went back up into the court room with the intention of seeing that the parties did not escape; by the time I got in the court room, Mr. Pollard, the town marshal, came in, and some one on the outside locked us up in the court room; there was present in the room then Mr. Finley, Mr. Eagan, Mr. Jenkins, Mr. Pollard, the two negroes, Savage and James, a negro by the name of Burk Stevens, who had come up after the shooting, I think, and myself, were all that I remember that were locked up in the room; we were awaiting the arrival of the sheriff with his posse; at the time the shooting occurred I think there was in the room Mr. Florrid, but he went down ahead of us; Mr. Church had been in the room; I do not remember seeing him after the shooting, until I came back in the court room; if I remember right he was guarding the door; I did not see Mr. Eagan after the shooting commenced, until after I had come back from down stairs; the last I saw of him before I went to the parties he was sitting at the table before I got up; I was busy looking over a list of witnesses for the name of one who had been called for the contestant; when I got up and went to Mr. Paterson my impression is that Eagan and others were within the bar; I do not know that Mr. Eagan followed me, none that were engaged in the examination followed me out of the bar that I know of; my whole mind was fixed upon Paterson's danger; I do not remember hearing Mr Eagan say anything, or any other person say anything more than I have related; Mr. Savage and James had both been in front

part of the court room ten minutes before the shooting, but they had disappeared from the bar, but I do not know whether they went out of the court room or not, and do not know of Mr. Eagan sending them out on any errand whatever; the examination up to the time of the shooting was conducted in a perfectly quite and orderly manner; Mr. Eagan did not take any part in the difficulty that I say.

Cross-examined by the State:

Mr. Eagan did not do anything to prevent the difficulty that I saw after it was commenced; I do not know that he got up off his chair until after I left the room with Mr. Paterson; my impression is that Eagan, Savage and James were inside the bar when I came up from below, but I know that after that, while we were locked up waiting for the sheriff, Savage and James walked round in the room with their pistols in their hands; I saw James reloading his pistol inside the bar near where Mr. Eagan was standing; Mr. Eagan did not expostulate with him against reloading his pistol in my hearing; I did not hear Mr. Eagan at any time speak to Savage and James in condemnation of their shooting of Paterson from the time he was shot until Eagan left; Mr. Paterson, while in the room prior to the shooting, conducted himself in a perfectly quiet and peaceable manner; there had not been any demonstration made either by Mr Paterson or his friends to prevent from first to last the taking of the testimony prior to the shooting; when I heard the first of the shooting I presume I must have been greatly excited; there was considerable noise and confusion in the room; I do not remember what any person said, except what I have related, while the shooting was going on; there were five hundred and something more names on the paper I was looking over when the shooting began, which was a list of contestant's witnesses, and all

that I knew were negroes; the testimony of Charles Savage was taken the day before the killing, and was completed on that day, and was the only testimony taken on that day; the testimony was taken on the Eagan plantation two and a half miles from town, in an out-house in the yard of Dennis Eagan; I do not know why he (Savage) was in the court house on the 8th, as his testimony had been taken and completed the day before; I was very well acquainted with Savage prior to the time as to which I have been deposing, and also with Howard James; they had both been absent from this county some time, perhaps two months; I saw them in Jacksonville during the time; I am personally acquainted with Mr. Eagan; he claims to be a citizen of Madison county; he votes here, I know; he had been absent for some time, in fact I think I have not seen him here since the November election, until a few days before Paterson was killed; Mr. Eagan said he was acting as Notary Public in taking testimony, and that he received his appointment from Governor Drew just before he went out of office; he showed his commission to Mr. Finley.

Question—Do you know of your own knowledge, or from Mr. Eagan's statements, why evidence in the contested election case of which you have deposed was taken at Eagan's plantation, and not at the court-house?

Answer—I do not know of my own knowledge; General Jenkins remarked in the presence of Mr. Eagan that it was because they could take better care of the witnesses at the Eagan place.

Question—You have stated that you are well acquainted with Eagan, Savage and James. Do you know what the character of their relations were?

Answer—I consider them on very friendly terms; they were of the same political party. I have seen them together; I do not remember how often.

There is but one door to the court room in the east, and about fifty or fifty-five feet from where I was sitting when the firing commenced; the position Mr. Eagan was sitting in gave him a full view of all the space between him and the door.

Mr. Eagan was in the court room I think some time before I was; General Jenkins came up about the time I did; Mr. Eagan took his position at the table prior to my taking mine; General Jenkins could have seen all that was going on at the door from the position he took at the table; Mr. Finley and I could not have seen without turning round; as well as I remember I turned around as soon as I heard the report of a pistol; I heard three reports in quick succession; there might have been four, I would not be positive; at the time Savage leveled his pistol at me, and I told him not to shoot me, all the shots had been fired at Mr. Paterson that were fired at all; I am certain there was no shooting after I told him not to shoot me; the negro Burk Stevens, after coming in the room and the door was locked, was very boisterous, and seemed to be very uneasy and anxious to get out; he went to the window, on the south side of the room next to where the colored people were congregated, and had conversation with them, but I do not know what he said; there were over one hundred colored people assembled in the street around the court-house, mostly from the country, and not from the town; at the time Burk Stevens went to the window the negroes outside the court-house were very much excited.

Question—Did Mr. Eagan, when Burk Stevens was talking to the colored people from the window, remonstrate with him in any way to allay the excitement of which you have deposed?

Answer—He did not.

When I came back up stairs into the court room Savage

and James had out their pistols, and at first refused to submit to an arrest; I did not urge them to submit, and do not know whether Mr. Finley did or not; I was then prepared to force them, as I had carried a pistol with me on going up stairs the second time.

I joined in the posse after getting up there that made the arrest; Mr. Eagan did not aid in making the arrest after the killing of Mr. Paterson, neither did he advise them, Savage and James, to surrender as I know of; I do not know whether Dennis Eagan was armed on that occasion or not; the prime cause of the suspending the taking of testimony then and there was the excitement growing out of the killing of Paterson.

Redirect examination:

I had no conversation with Eagan after I came back up stairs after the shooting; Mr. Eagan appeared to be very much excited, particularly after the sheriff's posse had gone up there some time after the shooting; there was a few words spoken to him by one of the posse, other than that I know of nothing that should excite him or scare him; he, one of the posse, cursed him, but did not make any threats that I know of; there was no gun presented at Mr. Eagan that I saw; there was ample opportunity to have shot him by the party that cursed him, if he had desired to do so; the sheriff and others interfered and stopped the cursing; I don't remember that Eagan went to the window and called to the sheriff to come up after the door was locked; I did not see that; the sheriff went up with the posse; there was no attempt made to arrest these parties before the sheriff went up with his posse; I do not think it was more than five or ten minutes from the time of the shooting before the sheriff arrived with the posse; it possibly might have been fifteen minutes; I did not pay much attention to Eagan during this interval, but am in-

clined to think he was behind the bar walking about, but he may have been sitting during the time.

Question—What was the behavior of the other parties during that interval who were locked up in the room?

Answer—They were like me, I guess, awaiting developments; I do not remember hearing Mr. Eagan say anything at that time of any intended attack upon Mr. Paterson.

C. W. Stephens sworn for the State says: I was present at the election in Madison November 2, 1880, as one of the inspectors at Poll No. 2; during the day I saw Paterson, Eagan and Charles Savage, but not Howard James; I do not recollect seeing him, but think he was present before we completed the count; Mr. Paterson was a very ardent supporter of the Democratic ticket, and worked very hard for the nominees; Mr. Eagan and Savage were leaders in the Republican party in this county; Mr. Savage was one of the nominees for the Assembly by the Republican party; Mr. Eagan was a very ardent supporter of Savage as well as of the whole ticket; I did not on that day see any crimination or disturbances between said parties, but next morning very early, just after completing the count of the votes, there were some words passed between Eagan and myself, I think relative to a paper which Mr. Eagan desired to read to the inspectors; there were some words passed between Mr. Eagan and Paterson I think relative to that; I have forgotten what the words were, but I remember Mr. Paterson stated something about it being a hatched-up matter; I remember his using the words "hatched-up;" he and Mr. Eagan had no kind feeling for each other, which this conversation indicated; this took place about daylight in the morning; when Mr. Paterson came into the court room the morning he was killed, Eagan and he did not speak to each other to my knowledge; I was pres-

ent and heard and copied the most of the testimony which Savage gave in the contested election case at the Eagan plantation the day before Paterson was killed; part of his testimony referred very materially to Mr. Paterson.

Question—Were those material allegations touching Mr. Paterson, to your knowledge, true or false?

Answer—Knowing Savage well, and also knowing Mr. Paterson well, and seeing Mr. Paterson's conduct during the day of the election, I believed that Mr. Savage testified falsely; I knew Mr. Paterson well, and regarded him as one of the most unoffending, amiable and most peaceable young men of my acquaintance in this or any other community.

I cannot state whether the witness whose name I was looking for came into the court-house; I don't remember that I saw him; I mean the second witness; the first witness whose examination had been completed I am of the opinion left the room, for I saw him start out before the shooting.

W. N. Densler being sworn deposed as follows: I reside in Madison, Fla.; my occupation is a merchant; I was in the court-house about the 8th of February, 1881, at the examination of witnesses in the contested election case between Bisbee and Finley; I saw Mr. Frank P. Paterson in court-house that day; he was sitting at the table inside the bar, I think reading some testimony; I don't think I saw him there more than one minute; I had just got in when he handed the testimony to Charles S. Church that he was reading; I sat down to read it with him, Charles Church; I do not know what became of Mr. Paterson at the time, suppose he got up to go out; I was sitting just outside of the bar, on second bench, and Church was sitting in front of me on the first bench; I did not see Mr. Paterson any more until after the first pistol was fired; when I heard

the first pistol fire I jumped up off the bench, saw Charles Savage with his left arm around Frank Paterson's neck, and about that time I saw the second shot fired; saw the flash of the pistol of Charles Savage; in a very short while Paterson tore loose from Savage, and just as he tore loose from Savage and started to stumble I heard the third shot, but saw no flash; Mr. Frank Paterson fell on the floor; I don't remember whether he was helped up or got up by himself; he was taken by the arm by some one and led out at the door; Charlie Church, deputy sheriff, ordered no more shots to be fired in the house, and ordered Savage and Howard James to surrender and give up their pistols; Savage and James swore they would die before they would be arrested; Savage and James both had their pistols drawn all the while I was in the room; Savage and James both retreated back towards the bar where Eagan was, and when they got back to where I was, being between them and Eagan, Mr. Pollard, the town marshal, ordered Mr. Church to close the door to keep them from going out and to keep others from coming in; just at that time I left the room; I do not know what Mr. Eagan was doing, more than sitting at the table, as I had just gone in; I did not notice Mr. Eagan from the time the pistols fired until Mr. Paterson was led out at the door after he was shot; I never looked behind me but once; the firing of the pistols was the first knowledge I had of the difficulty; Savage and Paterson were about two or three feet from the door when I first saw them; I did not notice James at the time; I suppose the intervals between the reports of the pistols was about the time it would take to count four or five; Savage and Paterson separated after the second fire; no one got to them, but Charlie Church got near there; Savage and Paterson were near the length of the room from Eagan when the firing commenced; I do not know whether Ea-

gan said or did anything on that occasion or not; I did not hear Eagan say anything; I did not hear Mr. Eagan say anything to Savage, James or Paterson; I was sitting about ten or twelve feet from Mr. Eagan at first; I do not know whether he moved or not; I was sitting very nearly between Eagan and the parties shooting when I first heard the pistol report; I did not advance towards Savage and Paterson until the firing ceased; I only stood up and turned around, facing them; I suppose I was about 35 or 40 feet from Savage and Paterson when the firing commenced; when the firing occurred I think there was in the room myself, C. W. Stephens, Charlie Church, Howard James, Mr. Patterson, Charles Savage, Mr. Eagan, Mr. Finley and Mr. Jenkins, are all that I can remember being in the room, but others came in after; I do not remember seeing Mr. Florrid in the room.

Cross-examination by the State:

From the time I jumped up and turned around, when I heard the pistol fired, my attention was mainly directed to the combatants; from the time I got up I was looking at them until the firing was all over; I do not remember hearing anything said behind me in the bar until after the firing ceased; during the time of the firing I was intensely engaged in what was going on in front of me; after the firing ceased I heard Mr. Finley say, "for God's sake disarm those men;" that was all I heard from any one behind me in the bar; if Mr. Eagan said anything I did not hear him; Mr. Finley was on his feet when he spoke; I do not remember seeing Mr. Eagan at that time; neither do I recollect seeing Mr. Jenkins at that time; Mr. Eagan was the only citizen of Madison county that remained behind the bar after the firing commenced; Mr. Stephens and Eagan were the only citizens of Madison county behind the bar that I remember when the firing commenced, and Mr.

Stephens ran immediately to the combatants; I do not know that Mr. Eagan changed his position at that time at all; when the firing commenced I suppose the parties were about forty feet from me, and when it ceased they were about thirty feet from me; Charles Savage fired the second shot; I saw him shoot it and the flash of his pistol; I am satisfied he did not fire the third shot; from the shots being in the room I could not tell from what direction the sound came, nor did I see the smoke or flash from the third shot; Patterson had just torn loose from Savage, and was stumbling or falling when the third shot was fired; judging from the position James was in when the firing ceased, Paterson was nearer him then he was when the first or second shot was fired; Mr. Paterson was not making any resistance or assaulting either of the parties when the second and third shots were fired, but was trying to get away; from the position Savage occupied, held his pistol when the second shot was fired, the ball would have entered Paterson's breast; after the shooting, when James and Savage had their pistols in their hands, when they were ordered by the deputy sheriff, Church, to surrender, and swore they would die before they would be arrested, Mr. Eagan did not in my hearing say anything to induce them to surrender; I did not hear Mr. Eagan tell Savage and James to give up their pistols, when they were ordered to do so by the deputy sheriff; the order of the deputy sheriff to them to surrender and give up their pistols was made in the presence of Mr. Eagan, and loud enough for him to have heard the order; Eagan was about thirty feet from the deputy sheriff when he made the order for Savage and James to surrender and give up their pistols; Savage and James were at the time about five or six feet from the deputy sheriff; this occurred immediately after the firing; Mr. Patterson had left the room at the time these orders

were made by the deputy sheriff; from where Eagan was sitting at the table when I went in he had full view at the door; the conduct of Mr. Patterson, while I saw him in the court room in the bar, was peaceful and respectful to those therein; Eagan's conduct was also peaceful and quiet to those therein, so far as I saw; Mr. Eagan did not speak to Mr. Paterson in my presence at all; Mr. Paterson was remarkable for his peaceable and quiet disposition in this community; I have known him since the fall of 1876.

B. F. Moseley being called and sworn for and on behalf of the State, states as follows: I reside in Madison county, and am a clerk in John L. Inglis' store; I am acquainted with Dennis Eagan.

Question—Did you ever have any conversation with Mr. Eagan in regard to the action of certain parties touching the election of 2d of November last; if so, state what was said by him, and when and where it was?

Answer—On the morning after the election Mr. Eagan came in the store where I was; he was talking about the election, and pulled out a memorandum book and said he had all their names down; said they have had their day, and I intend to have mine; I don't remember all the conversation, but the above is about the substance of it; it was given in rather a threatening manner, and I understood it to be threatening to the names in the book; I did not see the names and do not know whose names were in the book; he appeared to be very much disturbed about the way the election had gone; I am certain he said they have had their day, and I intend to have mine; these words were said in a threatening and angry manner.

Question—Didi Mr. Eagan continue to reside in Madison county after that date?

Answer—I am satisfied he did not so continue to reside, but left for Jacksonville that night, and I have not seen

him since; I understand Mr. Eagan has business in Jacksonville in the Revenue Department; I am acquainted with Charlie Savage and Howard James; they were citizens and voters of this county at the last election.

Question—Do you know whether they absented themselves from the county soon after the election, and if so, where they went to?

Answer—I do not know of my own knowledge that they left the county only from hearsay; I do not recollectc seeing either of them in the ocunty since the election to thc present.

Cross-examination:

I do not know that Mr. Eagan has changed his residence and citizenship from this county to Jacksonville.

Question—What do you mean in your direct testimony by the expression, "I am satisfied he did not continue so to reside, but left for Jacksonville?"

Answer—I mean that I thought he returned to Jacksonville to take charge of his office as U. S. Revenue Collector.

John Brady sworn on behalf of the State says: I reside in Madison county, Fla.; I am a farmer by occupation; I am acquainted with Charles Savage, Howard James and Dennis Eagan.

Question—If you have had conversation with them, or either of them, about F. P. Paterson prior to his death, state what was said and where and when the conversation occurred?

Answer—I had a conversation with Charles Savage at Jacksonville, I think about the 1st of January last; he was speaking of coming back to Madison; he said he expected to come back to Madison, and he thought he might have some trouble, but if he did he was coming prepared to defend himself; he said he did not propose to be treated as

he had been treated in Madison by some few any longer; he mentioned the names of a few; he told me about a cursing I gave him, and Mr. Hankins; he said he did not think much of it, as he thought we were drinking; he said Mr. Frank Paterson, Mr. Forester and Mr. Waring had been making some threats about him, but if either of them got the advantage of him they would have to be mighty quick to do it; James was not present.

Question—Was Mr. Eagan in Jacksonville at this time, and present at this conversation?

Answer— I did not see Mr. Eagan in Jacksonville, but understood he was in Jacksonville sick at the time; he was not present at the conversation; I saw James in Jacksonville about that time.

P. S. Coggins being sworn states as follows: I reside in Madison county, State of Florida; I am a clerk in a dry goods store; I know Charley Savage, Howard James and Dennis Eagan, and knew F. P. Paterson in his life time; I saw Eagan, Savage and James all together a short time before Mr. Paterson was killed; I saw them together on the morning of the 7th February, 1881, and Mr. Paterson was killed on the 8th; they were together at the Madison depot, and saw them walk up the railroad to the crossing, which is about 70 or 80 yards; they stopped at the railroad crossing and talked together about ten minutes; this crossing referred to is west of the depot, about 70 or 80 yards.

Question—Was there any other white man present at the crossing where this conversation occurred between Eagan, Savage and James?

Answer—There was none; Mr. Jenkins was standing off where the buggy was; Eagan, Jenkins, Savage and James came on the train from Jacksonville that morning; the train was rather late arriving that morning.

Question—Was the crossing at the depot more public than the crossing where they had the conversation to which you deposed?

Answer—It was more public.

I noticed that Savage and James had arms; each one had a gun in his hand as much like this one I hold in my hand as I ever saw; they are called Springfield army cavalry rifles; they are breech-loaders; I do not know whose gun this is I hold in my hand; I find it in the custody of the sheriff, he being now present; I cannot swear that this gun is one of the guns I saw that morning; it resembles them exactly.

Cross-examination:

The crossing where the conversation occurred is west of the depot in the direction of Eagan's house from where he got off the train; when the conversation broke up Eagan got in his buggy, he and Jenkins, and went in the direction of his house; Savage and James went down the railroad in the direction of where Savage lives.

John B. Brinson being called and sworn on behalf of the State says: I reside in Madison county, Fla., am a clerk in Captain Inglis' drug store; I am acquainted with Dennis Eagan, Charles Savage, Howard James, and knew Frank Paterson in his life time; I was at the Madison depot on the morning of February 7th just when the Jacksonville train came in; I saw Eagan, Savage and James that morning after they got off the cars.

Question—Did you notice anything unusual which attracted your attention to the parties, if so, state what it was?

Answer—They each had a gun; Mr. Eagan had a double-barrel breech-loading shot-gun; the guns Savage and James had, as well as I could see, were like the gun I see there in the custody of the sheriff; Mr. Eagan put his gun in Mr.

Tidwell's wagon, which wagon went out towards the Eagan place where Tidwell lives; Eagan then walked up the railroad with James and Savage; I saw them in conversation; saw no one else in the conversation but Jenkins, and am not positive that he was; I don't remember whether Jenkins walked up the railroad with them or not; the gun Eagan had looked to be a new gun.

Cross-examination:

I do not know what Eagan, James and Savage were conversing about.

Question—Did you ever see any other white man have a new breech-loading double-barrel shot-gun?

Answer—I have.

Question—Did you ever see any other negroes have guns in this county?

Answer—I have.

Redirect examination:

Question—Did you ever see two negroes in this county get off a train before each armed with a breech-loading army cavalry Springfield gun like the one now shown you?

Answer—I never did before that morning.

Edmond Burroughs being sworn on the part of the State says: I live in Madison, Madison county, Fla.; I belonged to B. P. McLeary before emancipation; I have no particular occupation; I job about at any kind of work for a living. The witness was handed a breech-loading army Springfield rifle now in the custody of the sheriff, and asked if he knew that gun; answers I do. Howard James left the gun at my house the night before Paterson was killed; Charlie Savage also left a gun at my house; his gun was about the same length of this, but not exactly like this; it shot oftener; they stayed all night at my house that night; I know Savage's gun shot oftener because I

have shot it before that time; it was his own gun; he had owned it two years or longer; there was no other guns left at my house at that time, nor no other time; I think the guns were loaded, but do not know for certain, for I did not examine them; the gun Savage left was a breech-loader; just after the fracas commenced Charlie Savage's father called at my house for the guns, and I gave them both to him; Savage and James had been carried to the jail when old man Amos Savage got the guns; Charlie Savage and Howard James came to my house early in the night before the killing of Mr. Paterson; it is about two miles and a half out to the Eagan place; it is about three hundred yards from my house to the colored school-house; that school-house is between here and Eagan's place; the school-house is in sight of John L. Miller's house; he (Miller) lives in the corporation, so is the school-house.

Cross-examination:

I reckon my house is about three-quarters of a mile from the court-house, but I don't know; I live in the corporation; I never saw this gun until the night James left it at my house.

Question—How old was the gun James left at your house?

Answer—I don't know when it was manufactured.

Question—Is there any particular mark or make about the gun you have testified about as having been left at your house by James by which you can identify it as the same gun here?

Answer—It looks like the same gun; it has a blue barrel and is a new gun; it was a short gun like this; it is the same gun I gave to Mr. Hankins, the sheriff; I did not examine the gun the night James left it at my house; I did not examine it the next morning.

Redirect examination:

The gun that James left at my house was a new gun; looked like it had never been shot, and had a blue barrel.

S. M. Hankins sworn on the part of the State says: I am sheriff of Madison county, Fla., and was on the 8th February inst.; this gun I have in my custody I took from Edmond Burroughs; I think it is known as a Springfield cavalry army rifle; it is a breech-loader, and shoots Cartridge No. 45; it was loaded when I took it from Burroughs; I took the gun on the 8th February, the day that Paterson was shot; I have been handling guns since I was eight years old; I cannot say positively whether it had ever been shot or not, but from the looks of the gun I thought it never had; it is a new gun; when I got the gun the tallow that is used in packing new guns for shipment was still to be seen on the breech and muzzle of the gun; from my knowledge of fire-arms I consider this a very deadly weapon, and one that can be fired very rapidly; I found some cartridges in Howard James' coat-pocket that fits this gun; I found the cartridges after Paterson was killed; the cartridges would not fit any other gun that I could find; there has been five military companies here and the cartridges would not fit any of their guns; I arrested Savage and James after Paterson was shot; the arrest was made in the court room; when I first entered the court room they were standing between the table and the judge's stand; Mr. Eagan was on the side of the table they were, and Mr. Jenkins was at the north end of the table; Savage and James each had a pistol in the hand at the time; I thought at first, from their actions, they did not intend to give up; I then told Savage that I had a warrant for him, and said I was going to arrest him; I went ahead of the posse; he met me and asked me to protect him, and handed me his pistol; James walked across the floor for perhaps a minute with pistol in hand, myself and Savage

between him and the posse; he finally gave his pistol, I think to the town marshal, Mr. Pollard, who handed the pistol to me, and surrendered; Savage's pistol was a large British bull-log self-cocking pistol, carried a Cartridge No. 44; it is a five-shooter; it is not a new pistol; the pistol taken from James is a small nickel-plated new five-shooter; shoots No. 32 cartridges; when I got the pistol from Savage it had but one empty shell in it, the other chambers were loaded; the pistol taken from James was fully loaded, but had been snapped, as the pistol showed, by the indention on the cartridge.

Question—Do you know whether their pistols had been reloaded after Paterson was shot, and if so, how do you know it?

Answer—Howard James said to me in the presence of Mr. Eagan, "you know I did not shoot for my pistol is all loaded;" he ran up to me in the excitement and said, "what do you want with me, I did not shoot, my pistol is all loaded," and repeated this several times on the way to the jail; about the time we got to the jail Savage said, "hush, Howard, you reloaded as I did;" Howard remarked, "I did not shoot;" I said to Savage, "one barrel of your pistol is empty;" he said, "no sir, I shoved all the empty cartridges out with Mr. Eagan's pen-holder and reloaded;" I examined the wound in Mr. Paterson's left hand; the wound was on the finger next to the little finger; it was shot right through; from my knowledge of fire-arms it was impossible for the wound to have been made by a ball from Savage's pistol; I think as large a ball as Savage's pistol carried it would have cut off the finger; the wound was a round hole through the finger, looked like it might have been made with a buck-shot; Mr. Paterson had a very small finger; I don't think the ball tore out on either side of the finger, but went right through the

finger; when I came to make the arrest there was a large crowd of excited people around the court-house; I placed a guard at the door to keep the negroes from going up stairs uutil I made the arrest; some of the negroes were armed; I saw one double-barrel gun, and some of them had sticks; Burk Stephens' wife was in a wagon with a gun calling to the crowd to come on and show themselves as men; the wagon that Burk Stephens' wife was in was about twenty feet from the court-house door; I do not know whether that wagon left when Mr. Eagan left or not; I did not see Mr. Eagan when he left; I saw a crowd running in the direction of the colored school-house, and Burk Stephens' wagon with them; I did not see Eagan in the crowd; I was about one hundred and fifty yards from the crowd; there was a warrant placed in my hands for the arrest of Eagan that P. M. at half-past five o'clock; I got to his place about or near dusk; I did not arrest him, as I did not find him; I searched for him; I never saw Mr. Eagan any more after the day of the killing of Paterson until I saw him in jail in Tallahassee.

Cross-examination:

I do not know Mr. Finley; do not know whether he was in the room or not; I saw in the room Mr. Pollard, C. W. Stevens, a negro by the name of Burk Stephens, besides Jenkins, Eagan, Savage and James; when I went in to make the arrest, Burk Stephens was at the window on the south side of the house; C. W. Stevens and Pollard were on the north side of the house outside of the bar; I was excited and might have overlooked others in the house; I kept my eyes on Savage and James, as they had pistols drawn; Savage and James were about ten feet from where Eagan was standing, who was a little to the north of the centre of the table on the west side of the table; Savage and James were about the middle of the hallway, between the table and

judge's stand, on the west side of the table, and to Eagan's right; they were all facing towards me; I do not know whether Mr. Eagan heard the remark of Howard James about reloading the pistol or not.

Redirect examination:

The remarks of Howard James about reloading his pistol were uttered in language sufficiently loud to have been heard by Mr. Eagan from the position they occupied.

Cross-examination:

The remark was addressed to me.

Question—Is it probable that Mr. Eagan, under the excitement of the occasion, would have heard or paid any attention to the remark as addressed to you unless his attention was there drawn to it?

Answer—I do not think he would have heard it unless his attention had been called to it, for he was badly excited at the time.

W. R. Boyd being called and sworn in behalf of the State says: I am a lawyer by profession, and live in the town of Madison; I use as a law office a room under the room used as a court room, the same also being used as a sheriff's office; I was in my office on the morning of the 8th February inst. when Frank Paterson was shot; I was reading at the time; I heard two shots fired in quick succession in the court room above, and considerable commotion of persons moving about, or appeared to be; immediately after the firing of those two shots I heard some person in the room over head speak very loudly, saying, "shoot him again," and another shot was then immediately fired; before the last shot was fired I jumped up out of my seat, threw my book down and went directly to the door of the room I occupied; I think the last shot was fired about the time I jumped up; I am certain it was fired before I got to the door; I was in the act of getting up

when I heard the words "shoot him again;" the door of my office that I went to is the door that opens to the street on the south side of the building; when I got to the door I saw several colored men in the street moving towards the entrance that leads to the stairs of the court room; nearly every one was armed with a stick, and seemed to be considerably excited; I started into Judge Witherspoon's office which was adjoining mine, and met him as he was descending the steps of his office; he said, "Boyd, run across the street and get a doctor, the first you meet;" I asked him, "who for?" he said, "Frank Paterson;" he said, "he is shot or killed," I forget which, I disrememder; I ran across the street and saw Dr. Sessions, and called to him to come over to the court-house; I came immediately back; I passed by a crowd of negroes in front of the court-house, all along in front of the building; I suppose there must have been between seventy-five and one hundred negroes in front of the building; some of them had been sitting on my steps; they jumped up when the firing commenced; I saw this crowd of negroes as they commenced gathering that morning.

Question—Did you see anything in connection with the assembling of the negroes at the court-house that morning before the shooting that attracted your attention?

Answer—I noticed particularly nearly all of them were armed with sticks; I can swear that I saw Savage in the crowd that morning; I do not know Howard James; I did not see Eagan in the crowd; I saw him pass the front street, but did not see him go to the court-house.

Question—Were any fire-arms exhibited by the people congregated in front of the court-house door, about or near the time of the shooting?

Answer—There were fire-arms exhibited soon after the

shooting; I saw them when I returned from across the street, which was five or ten minutes after the shooting.

Question—Who had them, and what was their deportment?

Answer—There was a negro woman standing in a wagon about ten or fifteen feet from the court-house, and about twenty-five feet from the court-house entrance, holding in her hands a double-barrel shot-gun, crying out to the negroes, "to go up in to the court-house and take them men and not to let them take them, and not to go up with nothing, but come there and get the gun or guns," I do not know which; she told the negroes to be men and not to be cowards; this she repeated frequently; I went to the wagon and told her to put down the gun; she laid it down across the seat; I saw her immediately with the gun in her hands again exhorting them as before; this woman was Vine Stephens, the wife of Burk Stephens; among other things she said the white men would soon be there with their guns, now is the time; when I first saw her with the gun the sheriff and posse had gone up stairs, but went up immediately; when the posse came down stairs with the prisoners, and afterwards there were several parties trying to calm the crowd of colored people below, I for one said to those people that the prisoners were in the hands of the law, and let the law take its conrse; Mr. S. Y. Finley, Judge Witherspoon, Dr. Sessions and Mr. Spradley were among those who made an effort to calm them; after the posse came, and while Finley and others were trying to calm the colored people, or about that time, I observed Mr. Eagan and General Jenkins; if they were endeavoring to calm the crowd I did not observe it; Mr. Eagan remained but a very short time in front of the court-house; Mr. Jenkins and he started off, and the negroes crowded around them, and they went off together; they went off in the

direction of the drug store, which is in the direction of his house, immediately this side of the drug store; I saw him last still surrounded by the negroes; it is about 150 yards from the court-house to where I saw him last; I think there were fifty or sixty negroes went off with Eagan and Jenkins; there might not have been that many; I could not tell what part of the room the words come which I heard, "shoot him again;" my office is under the court room, between the centre and east end of the court room; I am certain the words "shoot him again" was spoken before the last fire.

Cross-examination:

I don't think it was exceeding three seconds between the second and last fire; I heard three reports, and no more; I did not recognize anything else that was said in the room above; I did not recognize the voice; there was not any perceptible excitement among the negroes outside of the court-house before the firing commenced; I did not notice any guns in the hands of the negroes that day, except the shot-gun the woman had; the crowd that went off with Eagan and Jenkins did not display any fire-arms that I saw; I never saw Eagan and Jenkins until immediately after the sheriff came down from the court room with the prisoners; Eagan looked very pale; he did not speak as though he was much excited; he spoke to Jenkins somethink about going home; was the only words I heard him utter; I am not personally acquainted with Mr. Eagan; my acquaintance with him was not sufficiently so as to recognize his voice.

J. B. Wiginton sworn on the part of the State says: I am a citizen of Madison, Madison county, Fla.; I am a doctor of medicine; I was acquainted with Frank P. Paterson in his life time; he is dead; he died the day of the shooting; I was called to see him after he was shot; the

call was as a physician; I found two wounds on his person; one of those wounds was calculated to produce death; it was the one two and a half inches below the right nipple; it was from the effect of this wound he died; the other wound was in the left hand, but was not mortal; I think he lived about one hour after he was shot.

O. F. Florrid sworn on behalf of the State says: I reside in the town of Madison, Madison county, Fla.; I am a merchant; I was in the court room on the morning of the 8th February inst. when Frank Paterson was shot; he was shot by Charles Savage; I am sure there were three shots fired; I was standing up at or near the bar; there was one seat between me and the bar; when the shooting commenced I was about four feet north of the entrance of the bar; when the second shot was fired I had turned around and walked up near where the combatants were; I suppose I was within five or six feet of them when the second shot was fired; immediately after the second fire I heard a voice in the room say, "shoot him again;" this was just before the third fire; I did not see any person in front of me at the time but those three men, Savage, James and Paterson; I don't remember there being any person either on my right or left at the time I heard the voice; I did not recognize the voice; there was such an excitement in the room I cannot tell from what part of the room the sound of voice came; I looked around to see, but could not see or discover from which direction the sound of the voice came; my face was to the east before I looked around; there were some gentlemen behind me at that time, but I cannot call any names, neither do I know how many; I mean in the west end of the room.

Question—At the time you heard the words "shoot him again," was Mr. Eagan in the front or on either side of you?

Answer—I do not know where Mr. Eagan was at that time.

Question—At the time you heard those words, did you see any one on your right or left, or in front, other than Savage, James and Paterson?

Answer—Mr. C. W. Stevens was a little to the rear on my left; I did not see any one else.

I heard the words "shoot him again" distinctly; I am positive I heard the words before the last shot was fired; I am not positive which it was, James or Savage, that fired the last shot; I am certain James had a pistol; I saw it; he snapped it at me; I am under the impression he fired one shot; I am not certain whether it was before or after he snapped at me.

Cross-examination:

At the time I heard the first pistol fire I was standing behind Bench No. 1 at the end of Bench No. 2, outside of the bar, as shown on diagram, at or near the point indicated by the letter F on the diagram; when I first saw Savage, Paterson and James they were about eight and a half feet from the first post towards the door of the court room; there had been but one shot fired when I first saw them; I think it was twelve or fifteen seconds from the time the first shot was fired until that of the second; when the second shot was fired I was on Bench No. 9; at this time Mr. Stevens was to my rear and left; I cannot point to the direct point; when James snapped his pistol at me he was standing near Bench No. 9 east of me; at this time Savage was to James' right a little to his rear; Savage was about No. 15 on the carpet, as well as I remember; I am not positive where Paterson was at this time, but think he had staggered and fell against the post; the second shot had then been fired; the third shot was fired as quick as he could shoot after the second; I had seen Mr. Paterson in

the court-room before the difficulty ocurred; he was inside of the bar when I walked in the court room; I had not been in the room more than half a minute before the difficulty occurred; I saw Mr. Paterson when he left the bar; it was but a few seconds after he left the bar before the difficulty ocurred; I saw Savage and James in the room as I went in, but cannot say but, but am inclined to think were coming out of the bar, but did not pay any attention to them, and cannot say; when Mr Patterson left the bar he walked east towards the door; I am not positive where I did see James and Savage, but think I noticed them in the room, but cannot say where; this was before I saw Paterson go out of the bar; everything was quiet when I went in the room; I disremember whether Mr. Eagan was writing or reading when I went into the room; I cannot precisely locate Mr. Eagan's position, but he was on the west side of the table next to the judge's bench, can't say, but think he was sitting; I did not see Mr. Eagan any more after my attention was attracted to the firing in the court room.

Redirect examination:

There was time enough between the second and third shots for me to have heard the words "shoot him again;" at the time I heard the words "shoot him again" there was great excitement and confusion in the room.

C. S. Church sworn on behalf of the State says: I live in Madison county, State of Florida; I am acting deputy sheriff; I was in the court room on the morning of the 8th February when Frank Paterson was shot; he was shot by Charles Savage and Howard James, or at least they both shot at him; I saw Howard James shoot at him; I was in ten feet of him when he fired the pistol; there were three shots fired; the last shot was fired by Howard James; the second shot was fired by Charles Savage; between the

second and third shots I heard a voice in the room say, "shoot him again;" I then immediately drew my pistol and said "the man that fires the next shot I would kill him;" Charles Savage and Howard James were in front of me; Frank Paterson was also in my front, but to the left; I do not know who made the remark; I do not know where the words came from; there was time enough between the second and third shots for me to hear the words distinctly; I could not tell where the words came from, for I was watching Savage and James, expecting them to shoot me; I was watching both Savage and James, and had my eye on them, and if either of them spoke it I did not see their lips move; Mr. Densler was near me about that time, and some one else, I do not know who; I was not in the room when Savage and James were arrested by the posse; Savage had went to a window to jump out, and I ran down out of the court-house and around under the window to prevent his escape; I came to the court-house with the posse; I summoned them myself, and brought them to the court room, but I did not go in with the posse for the reason as given above.

Cross-examination:

When the first shot was fired I was standing near the first bench outside of the bar with a back to it; the first shot was fired by Charles Savage; Paterson and Savage were about four or five feet from the door of the court room inside when the first shot was fired; James I suppose was standing ten feet from the door on the right as you come out inside; I cannot be exact about it; he might have been further or nearer; I judge him to have been about that far from the door; when the second shot was fired the parties had struggled and got a little further from the door nearer me, perhaps about the middle of the walk-way or aisle on the carpet; I was about five feet from the post next to the

the court-room before the difficulty ocurred; he was inside of the bar when I walked in the court room; I had not been in the room more than half a minute before the difficulty occurred; I saw Mr. Paterson when he left the bar; it was but a few seconds after he left the bar before the difficulty ocurred; I saw Savage and James in the room as I went in, but cannot say but, but am inclined to think were coming out of the bar, but did not pay any attention to them, and cannot say; when Mr Patterson left the bar he walked east towards the door; I am not positive where I did see James and Savage, but think I noticed them in the room, but cannot say where; this was before I saw Paterson go out of the bar; everything was quiet when I went in the room; I disremember whether Mr. Eagan was writing or reading when I went into the room; I cannot precisely locate Mr. Eagan's position, but he was on the west side of the table next to the judge's bench, can't say, but think he was sitting; I did not see Mr. Eagan any more after my attention was attracted to the firing in the court room.

Redirect examination:

There was time enough between the second and third shots for me to have heard the words "shoot him again;" at the time I heard the words "shoot him again" there was great excitement and confusion in the room.

C. S. Church sworn on behalf of the State says: I live in Madison county, State of Florida; I am acting deputy sheriff; I was in the court room on the morning of the 8th February when Frank Paterson was shot; he was shot by Charles Savage and Howard James, or at least they both shot at him; I saw Howard James shoot at him; I was in ten feet of him when he fired the pistol; there were three shots fired; the last shot was fired by Howard James; the second shot was fired by Charles Savage; between the

in Madison county, Fla., about twenty-six miles from the court-house; my occupation is that of a farmer; I was in Madison at the court room the morning of the 8th February inst. when Frank Paterson was killed; I came to town that morning to bring a load of cotton and to pay my taxes; I had a letter for Mr. Frank Paterson, and was informed he was at the court-house; went over to see him; I know Howard James, Charles Savage and Dennis Eagan, all three; I saw them all that day; I first saw Savage and James that day on the stair steps leading up into the court room as I was going up to see Mr. Paterson; I had stopped on the platform where the steps turns and was coughing; they (James and Savage) passed me while I was stopping; they were going up into the court room; they were together; I noticed as they turned up the steps from where I was standing coughing Savage had a pistol in his right hand holding it behind him under his coat tail; in about a minute after this I went up to the court room door; I did not go into the court room because I saw Mr. Paterson coming towards me when I got to the door; Mr. Paterson had just left the table in the bar and was coming towards me when I first saw him; I saw Howard James and Charles Savage also at that time; Savage was standing about seven or eight feet inside from the door, and James about ten or twelve feet from the door inside towards the bar; I do not know what they were doing there; they were just standing there; they were near the carpet leading to the door to the left or south side of the carpet; when Mr. Paterson got to where Savage was he (Paterson) had a paper in his hand; I cannot say what was the position of the hands of either James or Savage were at that time; Mr. Paterson held out the paper he had in his hand to Savage and said, "the man that swore to that perjured himself;" Savage blustered out with an oath, "damn you," and about that

the court-room before the difficulty ocurred; he was inside of the bar when I walked in the court room; I had not been in the room more than half a minute before the difficulty occurred; I saw Mr. Paterson when he left the bar; it was but a few seconds after he left the bar before the difficulty ocurred; I saw Savage and James in the room as I went in, but cannot say but, but am inclined to think were coming out of the bar, but did not pay any attention to them, and cannot say; when Mr Patterson left the bar he walked east towards the door; I am not positive where I did see James and Savage, but think I noticed them in the room, but cannot say where; this was before I saw Paterson go out of the bar; everything was quiet when I went in the room; I disremember whether Mr. Eagan was writing or reading when I went into the room; I cannot precisely locate Mr. Eagan's position, but he was on the west side of the table next to the judge's bench, can't say, but think he was sitting; I did not see Mr. Eagan any more after my attention was attracted to the firing in the court room.

Redirect examination:

There was time enough between the second and third shots for me to have heard the words "shoot him again;" at the time I heard the words "shoot him again" there was great excitement and confusion in the room.

C. S. Church sworn on behalf of the State says: I live in Madison county, State of Florida; I am acting deputy sheriff; I was in the court room on the morning of the 8th February when Frank Paterson was shot; he was shot by Charles Savage and Howard James, or at least they both shot at him; I saw Howard James shoot at him; I was in ten feet of him when he fired the pistol; there were three shots fired; the last shot was fired by Howard James the second shot was fired by Charles Savage; between t

they came down from the court-room; they remained but a very short time; they just come down and went right off; did not remain more than three to five minutes; at the time they came down there were several persons endeavoring to pacify these people; Mr. Beggs and Judge Witherspoon I recollect, and I also was endeavoring to talk to several; Mr. Eagan and Jenkins did not make any effort to quiet the crowd, as I saw they did not stay long enough; I saw a great many sticks and clubs in the hands of the colored people around the court-house door; Eagan and Jenkins were afoot the last I saw of them.

Cross-examination:

I cannot tell exactly how long it was between the first and second shots; I reckon it was about two or three seconds; it was just as quick as it could be, one shot right after the other; it was about four or five seconds between the second and third shots; when Savage said to Paterson "damn you," he gathered Paterson; Paterson done nothing that I saw, except tried to shove him off; I saw Mr. Eagan before Mr. Paterson came out of the bar; there was no disturbance in the court-house before this encounter took place; about the time of the first fire Eagan and all the rest in the bar got up and advanced towards the door, or I think so; there might have been some left there; they were crowding in the aisle, so that I don't know that all advanced; this was after the first fire; I do not know that I saw Eagan after the first firing; the last time I saw him in the court he was about eight or ten feet from the table outside of the bar; I did not take any particular notice; the second shot had been fired before he came out of the bar; I think he started about the time the second shot fired; I saw Savage when he fired the second shot; I saw Paterson and this man James and several others around the scene of the shooting at this time; I was standing on the

left hand side of the door on the outside facing the judge's stand, leaning against the facing of the door; from the beginning of the shooting to its termination did not include a space of time more than seven or eight seconds; it was a very short time after the firing of the first shot; there was much excitement and confusion in the room, but little noise except the shooting; I was somewhat excited of course, but not much; I was not scared; I did not hear any other words that I can recall during the time of the shooting, except the words "shoot him again."

Redirect examination:

I heard other words during the shooting, but I cannot recall them; the words I heard, "shoot him again," were louder than any I heard; when Savage said to Paterson, "damn you," he then gathered Paterson around the neck with his left arm; if Paterson had struck Savage I would have seen it; I was looking right at them; they were close to me.

Mrs. E. A. Miller sworn on the part of the State says: I live near the suburbs of the town of Madison, Fla., about three-quarters of a mile from the court-house; I am the wife of J. L. Miller; my residence is on the route from the Eagan place to town; I reside about one hundred yards from the colored school-house; I was at home on the morning of the 8th February, 1881.

Question—If you saw or heard anything that morning at the colored school-house, or near it, that attracted your attention, please state what it was, and as near as you can who were present?

Answer—My attention was attracted to the gathering of a large crowd of negro men at the corner of the school-house next to the road; they continued to gather there, some going up town and back again, and boy on a horse up to town and back again several times; seemed to be acting

as a courier; I did not see any guns at that time; they had sticks and were gesticulating to each other excitedly; I don't think there were less than a hundred in the crowd; I noticed a wagon there and one woman and one man in the wagon; Mr. Eagan and another gentleman came up in a buggy; it could be called a stop he made; he turned his head as if speaking to them, and drove on, and the whole crowd followed him towards town; I noticed particularly that nearly every one had a stick as they moved on towards town; the man and woman that were in the wagon went on with the crowd and carried the wagon with them; I do not know the names of the man and woman that was in the wagon; I think it was ten or eleven o'clock when they left the school-house; I did not notice the time particularly; I know Mr. Eagan well enough to know that it was him in the buggy; I was very much excited after my servant returned from towards the school-house after talking with some of the crowd; this servant is a colored woman; her name is Amelia; you mistook her name in the summons for her; her name was down as Milley; she is still at my residence; I saw Mr. Eagan again that day as he returned in the direction of his place; it was over an hour I expect after I saw him going towards town; I was more excited then because he came with such a crowd, and because of his usual direction towards his place, passing near my gate; there was not less than fifty, nearer one hundred, with him, all colored people, except one white man whom I took to be a United States Marshal; I did not notice any weapons or sticks in that crowd, but noticed the same wagon and the man in it, but the woman I did not notice; there was no other person in the wagon; Mr. Eagan was on foot, with a cigar in his mouth, but it was not lighted; the crowd and wagon were close to Eagan; I did not see any weapons or sticks; the excitement was

high, and I did not notice; there was a crowd going to the jail; I did not know at that time that Paterson had been shot; very soon after Eagan passed towards the school-house; there was squads of negro men coming in from the direction of the school-house towards town armed with guns; they came in squads; I saw a squad af four on horseback, and a squad of three on horseback with arms, and a squad of four on foot with arms, and other single persons with arms; I don't know how many; they were moving rapidly and excitedly; it was not a half hour after Eagan passed out of my sight until I saw the first of the armed colored people; they came the route Eagan went off on; the bulk of the crowd passed my house with Mr. Eagan going to town, and Judge Tidwell came on in the rear; he had a stick also; he usually walks with a stick.

Cross-examination:

I did not recognize the negroes that came in squads with arms as those that had gone out with Eagan, for I did not notice them individually, as they went out with him, nor those that came in armed, sufficiently to say whether they were the same or not.

John L. Stewart sworn by the State says: I am a Presbyterian minister of the Gospel; when at home I reside in Trenton, Ontario, Canada; on the morning of the 8th February, 1881, I was at Major John L. Miller's; I left home in Canada the 9th day of December last; I first came to Jacksonville and remained there two weeks, and then came to Madison. At this point by consent, and the witness being an invalid, the evidence of Mrs. E. A. Miller was read over to witness, and he was asked if the testimony of Mrs. Miller is correct, and if he had heard what was therein stated. To which the witness replied, it is correct up to the time that we got the word that Mr. Paterson was shot; I then immediately left Major Miller's

to go to Mr. Paterson, and remained with him until he died; it was not more than fifteen minutes after Mr. Eagan passed by Major Miller's on his way towards his place before we heard of the shooting; I saw a few colored people in the morning armed with guns who went up towards town after the gentleman who was pointed out to me as Mr. Eagan; he drove through the crowd and spoke, and the buggy drew up a little, and the crowd filed in after him, and those having arms were with the crowd; I only noticed a few with arms.

Amelia Daniels sworn on behalf of the State says: I live at Major John Miller's; I was living there the day Mr. Paterson was killed; I am cooking for Mrs. Miller; on that morning of that day I saw a crowd of colored people at the colored school-house; that school-house is near Mr. Miller's; I could not do my work, I got so scared; I had to go and tell Mrs. Miller of it; I did not talk with any of them; I did not go out of the house to them; I saw a little boy running by the gate, and he said "the white people had been killing up the black people and they were not going to stand it any longer;" I can't tell how old the boy was; he was a good sizable child; I believe he must have been about thirteen years old; he came right from the school-house; I do not know the name of the boy; I never saw him since; I was cleaning off the breakfast table when this occurred.

Cross-examination:

I can't tell you how high he was; he was a good sizable child; the boy was about four feet high; I had never seen the boy before as I know of; I am hard of hearing, and not so very hard neither; I do not know how old I am; I am not so very old.

D. L. M. Walker sworn on behalf of the State says: I live about one mile from this place on the road leading to

Mr. Eagan's: I was at home working in my garden the day that Mr. Paterson was killed; it was about one mile and a half from my house to Mr. Eagan's; I know Mr. Eagan when I see him; I saw Mr. Eagan that morning as he was coming to town, him and another gentleman in a buggy; they passed my house about eight o'clock; it was pretty early, the sun was not very high; there were several colored footmen and some three or four riding passed with him; I saw him again that day; as near as I can come at it I think it was between eleven and twelve o'clock I saw him; he was going back towards his house; he passed by my house; he was in a two-horse wagon; there was another white man with him, and I suppose between ten and fifteen colored men with him in the wagon; it was about as full as it could get; there was also between 40 and 50 colored men on foot in a run trying to keep up with the wagon; I did not hear any conversation by the parties that were with the wagon; a short time after a colored woman and four or five men came along going the same way towards Mr. Eagan's walking fast; I heard her say that Burk Stephens was too smart for them, they would not get him; she made this remark to the colored men that was with her; she used the remark as they passed by my house; I know Burk Stephens and his wife; it is his wife that made use of the remark I have related; I had not seen that wagon before on that day that I recollect of; I took it to be Dennis Eagan's own wagon; I had seen it frequently before that day passing my house; I did not see any arms with the crowd that went out with Mr. Eagan, but in about twenty-five or thirty minutes after Mr. Eagan passed my place; I suppose there was twelve or fifteen men came back from towards Mr. Eagan's with guns; I took some of them to be some of the same men that was following after the wagon; some of them were riding and some of

them were on foot; they passed by my house and went on towards town; they were walking pretty fast; I do not know where Burk Stephens was living on the 8th February; I know where Burk Stephens lived last year; he was living on a place he contracted with Captain Inglis for, near what is known as the Croom place, about two and a half miles south of town; I suppose the nearest route you could go it would be a mile and a quarter, or a mile and a half, from Eagan's place; in coming from that place to town it would not be the nearest way to come by Eagan's; when the wagon passed my house going towards Eagan's they were going at full speed, between a loap and a run, the footmen could not keep up.

After the preceding testimony had been filed in the Supreme Court, the following witnesses were examined on February 25th, 1881, in open court:

S. Y. Finley, sworn as a witness for the petitioner, testified as follows:

I reside in Jacksonville; name S. Y. Finley; am a lawyer; on the 8th of February, A. D. 1881, was in Madison, Madison county, Florida; was there as counsel for contestee in the contested election case of Bisbee vs. Finley; the proceeding being had was taking testimony before D. Eagan, acting as Notary Public, on Tuesday the 8th February, A. D. 1881; I was taking the testimony at what was called "the old court-house;" on that day one witness had been called by contestant's counsel; I think I had cross-examined him; the taking of testimony up to this time had been going on about 15 or 20 minutes; there were present beside myself General Jenkins, representing Bisbee, and a lawyer named Stevens who was assisting me; the official testimony was being reduced to writing by Mr. Eagan; the room in which testimony was being taken was up

stairs; the position of parties during the taking of the testimony of first witness was about as follows: Mr. Eagan sat with his back to Judge's bench, being between bar-table and bench, with face to the east and towards the door; General Jenkins sat at north side of bar-table to the left of Mr. Eagan; Mr. Stevens and I sat with backs to the door on the east side of the bar-table confronting Mr. Eagan, Stevens on my left; the first witness sat on my right, occupying the relative position to Mr. Eagan that Mr. Stevens and I did to Mr. Eagan; the diagram is correct according to my recollection, except that Mr. Eagan sat a little nearer to the center of the table; during the examination of this witness I have a very positive impression that Mr. Frank Paterson was in the bar reading a document which I supposed was the testimony in the case taken the day before; Paterson sat at this time, according to my impression, in the rear and rather to the left of Mr. Stevens; the man, Charles Savage, was all about there, in and out of the bar; he (Charles Savage) was, according to my best impression, engaged in no duty; his testimony had been completed in the county the day before; it had been, as I understood, signed up and completed at Eagan's house the night before in the country; as explanation I would state that on the previous day we wrote no testimony except as to examination as to first witness; on the day before we had some talk about inconvenience of meeting at Mr. Eagan's house, the matter was alluded to several times; before adjournment it was agreed that we would meet next morning in town; no particular place was designated; Mr. Stevens, my associate counsel, invited the party to take testimony at his office, saying that he would have a fire, and it would be convenient, but there was no definite place determined upon in town; next morning when Mr. Eagan and General Jen-

kins came to town they went to the court-house, not to Mr. Stevens' office, and when we found them they were there; Mr. Stevens and I went around there too; when we got there we found a great many colored people assembling there and around there; when we got there we went up stairs and found Mr. Eagan in the court room sitting about as marked on the diagram; don't know whether General Jenkins was there then or not, if not he came in soon; General Jenkins had obtained leave to take testimony there, and we were proceeding to business; there was some talk between Mr. Eagan and General Jenkins, some inquiry as to how the witnesses were to be gotten up stairs; it was suggested either by General Jenkins or Mr. Eagan that somebody be instructed to call witnesses as needed, and Mr. Eagan suggested Charles Savage as the party to perform that duty; he (Savage) was there seeming to take great interest in the matter; it just happened that way I think; there was no concert in the matter; I don't know whether he called the witnesses or not; after the examination of the first witness I can't say positively whether another was called or not; up to that time the proceeding was conducted in an orderly, pleasant and a peaceable way; Mr. Eagan during the examination of this witness was pleasant and respectful; he discharged his duty quietly; there was no disorder in the room at this time; at this time I don't know whether there was any disorder outside of the court room or not; the proceeding was interrupted after we had examined the first witness and were preparing to examine the second witness; there was an interruption and confusion produced by the firing of a pistol; after hearing this I looked around towards the door and saw Charles Savage near the door with a bright and glittering pistol in his hand, and another party very close to him; Savage seemed to be moving his pistol about as

ough he was trying to get the range of the other party; id not know who the other party was at the time; I can't ay when I first saw them whether they were clinched or not; my attention was mainly directed to Savage and his movements; both of them receded from their first positions near the door coming in the direction of us and the middle of the room; it appeared to me from the relative movements of the parties that Paterson was dodging around, Savage continuing to advance upon and endeavoring to get the range of his pistol upon him until he shot the second time; I think he shot the third time before Paterson fell, which was perhaps near the longitudinal centre of the room; my back was to the door, face to table, when I heard first report of pistol; there was a good deal of confusion, and I was a little excited myself; I hallowed at this man Savage and tried to get him to stop shooting; I cannot repeat exactly what I said; I think I told him to stop shooting, and told the others to stop him; I said this I think between the second and third shots, and I think perhaps afterwards; I think I remained up to third shot within the bar, but think I had walked to the entrance of the bar; up to the time of the tihrd shot I think Mr. Eagan, as well as myself, went to the entrance of the bar; I am not positive as to this; as to Mr. Eagan I don't know whether he had gone out of the bar before the third shot was fired; between the first and third shots I can't swear whether Mr. Eagan said anything or not; my attention was directed to Savage; I can't swear where General Jenkins and Mr. Eagan were relatively during this time; General Jenkins I think was near the bar and inside of it; after the third shot a deputy sheriff came in and confronted Savage and prevented his escape; Mr. Paterson went or was taken down stairs; I can't swear as to the position of Mr. Eagan after awhile General Jenkins took his position at the end

the table, and Mr. Eagan I think resumed his position standing up, and something was said as to going on with the testimony; General Jenkins said he was ready to go on; Mr. Eagan said he would adjourn to his house; from the time I commenced to take the testimony to the time Mr. Paterson was taken from the room, I heard Mr. Eagan say or do nothing during the taking of the testimony, nor did I hear him say anything indicating that he had anything to do with the difficulty between Paterson and Savage during the taking of the testimony; after the firing commenced I cannot swear as to what was said or done by Mr. Eagan, because I don't know; Mr. Eagan did not appear to be excited; he was very cool.

Cross-examination:

After the firing commenced my attention was directed to the combatants, particularly to Savage; the first witness' name I think was Wren; after his examination can't say where he went; think he retired; I never saw him after that; Mr. Eagan's position was such that he could have had a full view to the door where the combatants were engaged, unless there was some intervening object, and I know of none; General Jenkins' face was not exactly confronting the door; he could see the door by turning his head without leaving his position; Mr. Eagan was sitting at the table, as I described when Mr. Stevens and I entered the court room; we did not go to work at once; we had a pleasant conversation before commencing; I don't know when Mr. Paterson came in; I have a recollection of his coming in; he was sitting there quietly; would hardly have known he was there; I supposed he was reading the testimony; Savage's appearance caused me to revert to his testimony as to Mr. C. Smith, Forrester and F. Paterson; he stated that Mr. Paterson stood near the polls and would fold two tickets in one and give them out to vote; we were

there taking testimony before Mr. Eagan, a Notary Public, under the act of Congress, in a contested election case; my attention was attracted to Savage on the morning of the 8th on account of remarks that he made the day before; he had said that he expected to be kukluxed or killed; I was impressed that he had no business there that morning; he was acting in a very officious and brave kind of way, and did not appear to be afraid as he had pretended the day before; seeing him there I was reminded of the testimony that he had given the day before in regard to Mr. C. Smith, Frank Paterson and the inspectors; he had testified the day before that on the day of the election Mr. Frank Paterson woud stand near the poll or voting place and would fold ballots together and would give them to others to vote; General Jenkins chose Mr. Eagan to take the testimony as a Notary Public; we had had some talk before leaving Jacksonville in regard to taking the testimony at Mr. Eagan's plantation; we also talked about it afterwards; he seemed to regard it more convenient to the witnesses, and for taking care of the witnesses, to take the testimony at Mr. Eagan's plantation; his (Eagan's) house was about two miles from town; I have a good deal of experience in taking testimony in contested election cases; I don't recollect ever taking testimony in such cases at a private house before; yes, sir, Mr. Stevens and I went to the court-house after we heard that Mr. Eagan and General Jenkins had gone there; we had been waiting at Mr. Stevens' office where we thought the testimony would be taken, as Mr. Stevens had tendered it the day before; we had no explanation given us by Messrs. Eagan and Jenkins why they had concluded to take the testimony at the court-house instead of at Mr. Stevens' office; we did not ask an explanation; I do not know whether the second witness had come in the room when the firing disturbed us; I may

have taken the name of the witness preparatory to taking his testimony; he was called I suppose, as there were no white witnesses there that I know of; I am not positive whether this second witness had come in the room; I do not recollect seeing him at all; my attention was entirely directed to Savage; I am not positive that Howard James was in the court room; I know of a man by that name, but do not know him; I do not know of any colored man in the court room but Savage; I cannot swear to any other colored man in the room but Savage; when I saw Deputy Sheriff Church, cannot state how close Paterson and Savage were together when firing commenced; I think there were parties between the bar and combatants before the difficulty ended; I think Mr. Stevens was one; so much confusion I could not tell how long between the firing of the second and third shots, long enough for me to tell Savage to quit or stop shooting, I think; I was trying to stop affray; cannot swear to making use of any particular expression; the time between the first and last shots was long enough for Mr. Paterson in a zigzag way to stagger off from Savage to about the middle of the room; at or after the firing of the third shot Mr. Paterson fell (there might have been four shots); at time of last shot I think Savage was six or seven feet from Paterson, or thereabouts; Savage fired deliberately; don't remember of Mr. Eagan saying anything until the talk was had about resuming the testimony; about the time or after Paterson fell Savage was, as I feel positive and certain, with his face east confronting deputy sheriff, threatening to shoot the deputy sheriff; Savage afterwards sauntered around to where Mr. Eagan was, and between him and the window, north window; a short time after the firing, and after we were shut up in the room, I ordered Savage to surrender to the sheriff; cannot say that Mr. Eagan spoke at all; he was quite cool; I

know of no conversation between him and Savage after the firing; we were all pretty close together behind the bar I think after firing commenced; when I hallowed at Savage I did it aloud so that all present could hear it; no one asked him to surrender as I know of but myself; I did not see any arms among the colored people when we went up in the court room that morning; Savage's expression about "kuklux" and being shot made out at Mr. Eagan's plantation the day before was in the presence of us all; Mr. Eagan made no reply to it that I know of.

Direct examination resumed:

I don't know what Mr. Paterson said; I did not approach him at all; I saw him fall as though he was killed; when the sheriff and his posse came in I got out of the room; I have not read the testimony taken at Madison; I think that Mr. Stevens went to Mr. Paterson after he fell; I cannot testify to anything that Mr. Paterson said.

H. Jenkins, Jr., sworn as a witness for the petitioner, testified as follows:

I am a lawyer, and reside in Jacksonville; I was in Madison on the 8th day of February representing Mr. Bisbee before Dennis Eagan, Notary Public, in the contested election case of Bisbee vs. Finley; I secured the court room by note to the sheriff; I found Mr. Eagan in the court room with Mr. Finley and Mr. Stevens when I went there, near the table at the west end of the room; I proceeded to get ready; Mr. Eagan took his seat on the west side of the table facing towards the door; Mr. Finley and Stevens sat fronting him on the opposite side of the table, Stevens on Finley's left; I was at the north end of the table facing it lengthwise; I asked Eagan to get Savage to call the witnesses as they were wanted; we examined one witness whose name I do not recall; another had been called and [illegible]en his seat, and I was about to interrogate him when I

heard a few words in a high tone of voice or voices, and quickly a violent scuffle; I looked and saw two men scuffling together in conflict, nery near to the door, and with the utmost rapidity heard two shots in succession; after the second shot was fired one of the parties turned his face towards me, his back had been towards me; I think he began to turn when the first shot was fired, because it struck me he was hit; after the second shot he fell, recovered himself quickly, and went out of my sight, and out of the room; after the firing very soon I saw Finley and Eagan very near the seats they had been occupying; I don't recollect that any one was outside of the bar who had been there before; I remember that Mr. Finley said, "stop!" or "stop there!" or words to that effect; that was as I recollect after the shots were fired; I remained inside of the bar during the shooting; all remained inside of the bar; can't say that I recollect Stevens leaving; during the shooting I think I was about six feet from Eagan; I don't remember being separated from Eagan more than that distance; I did not hear him say anything; if he had spoken in a loud tone of voice I think I could and would have heard him; I did not hear Mr. Eagan during the shooting make any such exclamation as "shoot him again," or anything like it; I don't think it would have been possible for him to have spoken them so as to have been heard in the room below, and I have not heard them; the negroes around the court-house were witnesses; they had been summoned or rather notified to attend; they were quiet; saw nothing otherwise; everything was very quiet and peaceable in the court room; nothing indicated violence in the room or outside prior to the difficulty; after the shooting I saw Savage retreating before a white man who had a pistol in his hand; Savage came back to the west end of the room where we were, talking and explaining about the shooting; some one locked

the door, and for a few moments Eagan and the counsel in the case and the white man I saw Savage retreating before remained in the room until the door was opened by the sheriff; when Savage was retreating he had a pistol in his hand; a posse of armed men were with the sheriff, Hankins, and advanced towards Savage; the sheriff seized and called upon him to surrender, which he seemed reluctant to do; Mr. Eagan turned to me and said, "he should surrender;" I said, "yes," and Eagan told Savage to surrender, asking the sheriff at the same time to protect the prisoner against violence, which the sheriff said he would do, and Savage submitted; Eagan and I followed the posse out of the room and went down into the street; the witnesses and Mr. Finley and others were there gathered around, some were expressing fears for the prisoners, and we moved down towards the jail and the way leading out to Eagan's plantation; there appeared to be a good deal of excitement in town; I saw white men coming out the stores, some with guns; the general look of things indicated trouble; no attacks however were made that I saw; no guns were fired; about this time I spoke to Albert Willard, one of the guards of the prisoners then, though not one of the original posse, he told me then of Patersen's dying condition, or of his being mortally wounded; Eagan and I then went out to the plantation; Savage said, when he came back to the west end of the room, that Paterson had "jumped" him and struck him, and that he had to "shoot him to save his life," or words to that effect; this statement he made immediately after the shooting took place; I did not see the first witness examined in the room at the time the shooting commenced; I did not see him leave the room before the shooting; I do not remember seeing either of the witnesses during that day after the shooting began; they may have been in my presence during that time; I did not know

them personally; besides Savage and James I do not remember seeing any colored person in the room after the difficulty commenced that day; from the commencement of the difficulty to the end of the firing the persons in the room were Eagan, Finley, Stevens, Savage, James, second witness, name not known, Paterson, a man whose name was said to be Church, and that he was a deputy sheriff, and myself; I don't recollect seeing the second witness after my attention was called from his examination to the parties in difficulty; the difficulty started late in the forenoon, I think about eleven o'clock; I had been in the court room about three-quarters of an hour before difficulty commenced; I saw no shot fired; I heard two; I sprung to my feet at the first shot; the relative position of combatants at first shot was thus: Paterson was between myself and Savage, facing Savage with his back towards me; at first shot they were close, can't tell exactly how far apart; at the first shot, when I first saw them, can't say whether Savage had hold of Paterson; can't say whether one had hold of the other; they were in violent motion, and appeared to have hold of each other; I did not see any blow struck by either; I saw no arms in the hands of either at the time of first shot; the second followed first shot almost immediately; I think not more than a second or two intervening; the position of combatants at second shot was about the same; as to the room at first shot Paterson turned partially and quitely towards the end of the room where I was so that I could see his full face, and his manner and motion indicated that the shot had taken effect; at the second shot the parties were not so near together as at first; the distance had increased by Paterson moving backwards; I think they did not have hold of each other at the second shot; they were apart not more than two feet, perhaps three, difficult to tell exact distance from where I was; when second shot fired Pater-

son staggered to the floor; don't think he fell prone; think he recovered before he actually fell upon the floor; at that instant I did not see Howard James; as Paterson staggered and fell to the floor I do not recollect hearing a third shot; I was startled at that time, but not what you would call excited; my attention at that time was drawn particularly to what was going on between the combatants, particularly to Paterson, because I thought he was hit; between firing of second shot and Paterson falling the only words I heard was Mr. Finley's exclamation, which was at the time of the second shot or immediately thereafter, his exclamation was: "Stop! Stop there!" he used the word "stop" and other words with it; don't remember exactly what they were; with my attention fixed on combatants if there had been a third pistol fired about the time Paterson was falling I think it very probable that it would have attracted my attention; I may have heard it and have forgotten it; I can't recall hearing third shot; I first saw Howard James after firing coming towards west end of room where I was, I think in company with Savage; this was about a minute or a minute and a half after second shot; there was some loud talk between Savage and deputy sheriff before Savage retreated to the end of the room where I was, which lengthened the time of coming back somewhat; it was possibly not more than a minute; can't recall exactly where James was when I first saw him after second firing; I think he came down the aisle with Savage; my best recollection is that James when I first saw him was about half way between my position and where second shot was fired. Witness referring to diagram says: It is possible that James might have been in the aisle and I not have seen him, as my direct line of vision from my position to the point where the shooting was (as shown by diagram) would not strike the eye; I was north of the aisle; James

was armed when I saw him immediately after the shooting; he had his pistol out; the sort of pistol he had I do not know; it was a revolver; don't know whether it was new or old, or its pattern or make; when Savage and James were coming towards the bar they were very near each other; don't remember which was in front; I think the deputy sheriff had taken his seat between Savage and James and the door; when I saw them approach Savage and James came to the south end of the table, I being at the north; Savage and James were about six or seven feet from Mr. Eagan; I did not hear any conversation between Savage and James and Mr. Eagan at that time; I heard Savage's remark about shooting which seemed to be addressed generally to all of us; during the firing I did not speak; I did not have time to take in the situation, and said nothing; if I did I don't recollect it; during the firing, or at its close, there was in the bar no one else as I recollect except Mr. Finley and Mr. Eagan and myself; I think there was no one between me and the combatants opposite during the firing and up to its close; I did not notice any one inside of the bar between myself and combatants during the firing; after the shooting was over Mr. Eagan and I went down in the street, the posse having preceded us; there were below then about 30 or 40 colored people whom I took to be witnesses; they were considerably excited; the witnesses were brought there at my request to be examined in behalf of contestant in the contested election case of Bisbee vs. Finley; they were the same witnesses I understood who had been notified to and had assembled at Mr. Eagan's plantation for examination the day before, and word of the change was given them when the change was made in the place of taking testimony; I think there were about thirty at Mr. Eagan's the day before; I did not count them; I do not know who was the direct messenger

to summon them; it was understood in Jacksonville that Savage was to take charge of that matter, and he came up to Madison when I did for that purpose on Sunday night the 6th of February, as I recollect; we arrived at Mr. Eagan's plantation at almost five o'clock next morning; don't think the sun was up when we arrived at Madison; commenced taking testimony on the 7th about 11 o'clock, and continued taking it all day; I examined nobody but Savage that day; when I came out of the court room I did not notice a wagon; when we got some distance from the court-house, about 300 yards, I saw wagon in front of Livingston's store; I remember some of the colored people asked Mr. Eagan and myself to get into wagon and ride out to his plantation, which we declined to do, saying we would walk; I think I saw the same wagon at the place where we first found the witnesses assembled in the morning at what I supposed was the edge of the town, some distance from the court-house; I don't know who had it in charge when I first saw it; when I saw it the second time it was in charge of a man who I understood was named Burk Stephens, a colored woman being with him in the wagon; Burk Stephens was a witness in the contested election case; his wife was not; don't recollect seeing any arms in the wagon, except one double-barrelled gun; I have an impression that when I got into the wagon about three-quarters of a mile out of town, on the way to Mr. Eagan's plantation, there was a gun in the bottom of the wagon that interfered with the comfort of my feet; there was but one in the wagon; can't state positively whether it was a double or single-barrelled gun; think it was a double-barrelled gun; the wagon after I got into it went to Mr. Eagan's plantation, stopped there at the front gate, Mr. Eagan and I got out, and the wagon was driven off on the road; I saw it going from the front gate, about 20 or 30 yards, as

we went into the gate; from the statement of Mr. Eagan I know the wagon belonged to Burk Stephens; this statement was made last evening since my testimony taken then I asked him about it; I left Mr. Eagan's plantation to take testimony on the morning of the 8th, betwen 9 and 10 o'clock; at the edge of the town, where I first saw witnesses and the wagon, there were about 50 or 60 persons, all sizes included, men, women and children; I did not notice any excitement among the white people of the town until after the killing of Mr. Paterson; toward the attorneys taking the testimony and the counsel representing the parties everything was pleasant and courteous; previous to shooting I noticed no excitement among the colored people; at the edge of the town where I met the witnesses first in the morning there was a long building which I understood was a school-house; Mr. Eagan spoke to me about getting the building for taking the testimony; when we got nearly to the building I saw the heads of children, and Mr. Eagan remarked there was a school in session there; of the 50 or 60 persons there I can't say how many were women and children; can't say what proportion of them; when the colored people were notified of change of place of examination to town I do not think any place was stated to them; I think the court-house was alluded to as the place in their presence at which the examination might be had; when Mr. Eagan and I drove past the school-house there was hardly any stop; there was some little conversation about the taking of the testimony in town, and the conversation narrated as occurring between Mr. Eagan and myself; I had not given these persons instructions to meet at this particular place, and don't think that Mr. Eagan had; I have been informed that Burk Stephens lives about two miles from Mr. Eagan, on the same road beyond from

town; I learned the facts as to place of residence of Burk Stephens from Mr. Eagan last evening.

On the 26th day of February the court made an order discharging the petitioner as follows:

The testimony taken in this case having been heretofore submitted to the court by counsel for both the petitioner and the State without argument, and the same having been read by the court, and the matters contained therein having been duly and maturely considered, it seems to the court now here that there is not sufficient evidence to warrant the detention of the said petitioner, Dennis Eagan, in the custody of the sheriff; it is therefore considered and ordered by the court that the said petitioner be and he is discharged from custody, and it is further considered and ordered that the costs herein incurred in the prosecution of this matter be taxed against the State of Florida.

DECISIONS

OF THE

SUPREME COURT OF FLORIDA.

JUNE TERM. A. D. 1881.

THE STATE OF FLORIDA EX REL. CHRISTIAN A. HALEY, PLAINTIFF, VS. GUSTAVE STARK, RESPONDENT.

1. An act vesting discretion in the owners of one-half of the bonds of a city and twenty of its residents, by which they can dissolve the existing corporation having an elective system of government organized under an act creating a uniform system of municipal government, and re-incorporate the municipality with another and different form of government, under which the principal officers are appointed by the Governor, is unconstitutional. The power and duty of the Legislature under the Constitution is limited to the establishment of a uniform system.
2. Where the legislative intent is that the whole of a statute shall operate to accomplish an evident end and purpose, if that portion of the act providing for the accomplishment of the final purpose is unconstitutional, the dependent and initiatory provisions of the act must fall also. Where an act provides for the dissolution and re-incorporatiou of a municipality, and it is clear that the dissolution is authorized only as a step looking to and a foundation for the re-incorporation, if that portion which provides for the re-incorporation is unconstitutional, the whole act must fail.

The facts are stated in the opinion.

R. B. Archibald and *H. Bisbee, Jr.*, for Relator.

The relator respectfully submits that the statute of 1881

(Chapter 3316, Laws of Florida,) is in conflict with the Constitution, on the following grounds:

First. While cities and towns may be classified according to the number of inhabitants or voters, new classes cannot be created and classified according to peculiar conditions. If so, each town and city in the State might be under a different charter. The statute is virtually a local or special law (applicable to Fernandina alone) as much so as the statute of Ohio referred to in 17 Fla. Rep., 468. It is in conflict with Section 21, Article 4, Constitution of Florida, which provides that "the Legislature shall establish a uniform system of county, township and municipal government."

Second. Sections 2 and 5 of the act leave it optional with half the bond-holders and twenty persons whether the statute shall go into operation or not. 85 Penn. State, 401; 17 Fla., 268; 83 Ill., 585.

Third. The re-incorporation under said act may be compulsory, which is unconstitutional unless by direct legislative action. 29 Mich., 457; 24 Mich., 44; 18 Am. Rep., 109; 1 Dillon, Mun. Corp., 95; note, Sec. 22, Art. 4, Const. Fla.

Fourth. Section 8 of said act provides for the appointment by the Mayor of a Marshal, City Clerk and Treasurer contrary to Sec. 27, Art. 4, Const. Fla.

Fifth. The said act provides for the appointment by the Governor of municipal officers, who are to make and administer the local laws. 24 Mich., 44; Secs. 27, 17 and 18, Art. 4, Const. of Fla.; Cooley's Const. Lim., 4th Ed., pages 228, 229, 230, 43, 44; Sec. IV., 281, 212, 282, note; 1 Dillon, Mun. Corp., 82, 85.

Sixth. If any part of the act is unconstitutional, all other parts dependent upon and connected therewith must fall with it. The Legislature evidently intended the act as a

whole, as all parts are necessary to carry out their manifest design. Chief-Justice Waite, in Allen vs. City of Louisiana, Cent. Law Journal, No. 6, Vol. 12, page 137.

Seventh. Cities and towns coming under the operation of this act are declared to be "provisional municipalities," but the whole act taken together provides for a permanent city government, the officers of which are to be perpetually appointed by the Governor.

H. J. Baker and *Cockrell & Walker,* for Respondent.

It was not the intention of the Legislature, by the act in question, to create a new and permanent class of municipalities differing from the others in the State among other things in the matter of appointment of officers, &c., but merely to provide a provisional and temporary government by means of which to wind up and facilitate the adjustment of the bonded debts of such cities as may now or hereafter forfeit their charters under its provisions; only such cities as have passed under the operation of the law, and been dissolved, can be subject to this provisional system; hence the only class to which the system is applied arises upon the dissolution and repeal of the charter of a city under this act.

The constitutional provision that the Legislature shall establish a uniform system of municipal government would apply only when the system established was intended to be permanent, and could not with reason be held strictly applicable, whereas in this case the design of the Legislature is rather to provide for the protection of citizens and the credit of the State against fraudulent corporations, and the system provided provisional.

However we claim for the provisional system that it is uniform in its application to the dissolved classes of cities for which it was provided, and that such class will neces-

sarily have to pass under it or remain unincorporated so long as their bonded debt stands unprovided for.

Our Supreme Court construes our Constitution as not to prohibit a classification of municipal corporations under systems differing, provided the corporations of the same class should possess the same powers and be subject to the same restrictions. McConihe *ex rel.* vs. McMurray, 17 Fla., p. 270.

It is claimed by defendants that the act violates two fundamental maxims of republican government—1st, that government exists by the consent of the governed; 2d. that taxation and representation go together.

The court cannot declare an act unconstitutional solely because it is supposed to violate some political rights of citizens, unless it can be shown that such rights are guaranteed or protected by the Constitution. Cooley's Constitutional Limitations, p. 164.

The courts are not the guardians of the people's rights, unless as those secured by the Constitution. Nor are the courts authorized to declare a statute void because it appears to violate fundamental principles of republican government, unless such principles are placed beyond encroachment by the Constitution. Cooley's Constitutional Limitations, pp. 168 and 169.

In the case of the People vs. Mahoney, 13 Mich., 500, where the Metropolitan Police Act of Detroit was under review, (a board appointed by the Legislature, vacancies to be filled by the Governor,) the court said: "Besides specific objections to the act as opposed to provisions of the Constitution the counsel for respondents attack it on generul principles of our system, that government exists by the consent of the governed; that taxation and representation go together; that taxation under this act is really in the hands

of a board, a body in the choice of which the people of Detroit had no choice. Held, they were represented in the Legislature which passed the act, and had the same proportionate voice there as other municipalities throughout the State, all of which receive from that body the power of local government. They were represented in that body when the present Police Board was appointed by it, and the Governor, who is to fill vacancies, will be chosen by the people at large, including that city," &c. The court concludes by saying: "We cannot be with propriety asked to declare an act void on such general objections." People vs. Maloney, 13 Michigan, 500; Cooley Constitutional Lim., p. 170; Wynehamer vs. People, 13 N. Y., 429; Pensow vs. Mayor of Albany, 24 Barb., 256; People vs. Draper, 15th N. Y.; People vs. Fisher, 24 Wend., 220; Tennessee Rep., B. J. Lea 2, Memphis Case.

In case of Leurhman vs. Taxing District, &c., B. J. Lea 2. the Taxing District appointed by Governor had taxing power. In answer to argument of taxation without representation the court said the Legislature was representation enough. B. J. Lea 2, Tennessee Rep., Memphis Case.

An act of the Legislature ought not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. Com. vs. Smith, 4 Binn., 117; Wellingham vs. Petitioners, 16 Pick., 95; Sharpless vs. Mayor, 9 Harris, 147; Speer vs. School Directors, 14 Wright, 158; Erie R. R. vs. Casey, 2 Casey, 287; Penn. R. R. vs. Rebletts, P. F. Smith, 16, 164.

The court ought never to declare a statute void unless the nullity and invalidity in its judgment is placed beyond a reasonable doubt. A reasonable doubt must be solved in favor of the legislative action and the act sustained. Cooley's Constitutional Limitations, pages 181 and 182.

The court cannot examine questions as expedient or inex-

pedient, as politic or impolitic. Considerations of this sort must be addressed to the Legislature.

Questions of policy cannot be considered here. Chase, Ch. J., in License Tax Cases, 5 Wall., 469.

Where therefore a part of a statute may be unconstitutional, that fact would not authorize the court to declare the remainder void also, unless all the provisions are so connected in subject-matter that one cannot stand without the other. Cooley's Constitutional Limitations, p. 177.

Nor are courts at liberty to declare an act void because in their opinion it is opposed to a *spirit supposed to pervade* the *Constitution,* not *expressed* in *words.* Cooley's Constitutional Limitations, pages 171, 172; People vs. Fisher, 24 Wendell, 220; State vs. Staten, 6 Cold., 233; 15 N. Y., 391.

The act of February 24, 1881, was not intended by the Legislature as a whole. The first four sections repeal absolutely, and in such condition, without corporate existence, the Legislature provides the cities may remain, unless or until people of the district prefer to come under the system provided for such class of cities. They can reorganize under no other system while in such condition.

Will the court grant the information, conceding the title of the respondents to be invalid, if it would result in the suspension of a municipal government in the city? 4 Vroom, 195; 11 Vroom, 123.

In declaring a statutory provision unconstitutional, the court will strike out the unconstitutional part and enforce the residue, though it be a part of the same section, and even of the same sentence. 2 Peters, 526; 46 N. Y., 68; 5 Gray, 482; 2 Gray, 84; 7 Cal., 97; 40 Ala., 77; 29 Ala., 572; 4 Wheaton, 122; 3 A. K. Marshall, 76; Cooley's Const. Lim., 214; 20 Ohio, 173.

The Legislature unquestionably has plenary power to dis-

solve corporations. Mewervellen vs. Garnet, 102, U. S. 511; Cooley's Const., 4th Ed., 232-3, m. p., 192-3; Cooley's Lim., 195, m. p. 160; 200, 3-4, m. p. 165, 168.

A complete answer to the argument of Democratic maxims. Cooley's Lim., 205-6, m. p. 169-70; 53 Ala., 593; 15 Mich., 500; 15 N. Y., 547.

Legislation presumed by the courts constitutional, except in cases admitting of no reasonable doubt. Fletcher vs. Peck, 6 Cranch, 87; Morris vs. People, 3 Denio, 381; Deeamp vs. Eveland, 19 Barbour, 81; Clark vs. People, 26 Wendell, 593; 58 Ala., 596.

If the office, the duties of which were usurped, had no legal existence, it would follow no usurpation was established. People vs. Draper, 15 N. Y., 532; High on Ex. Rem. Sec. 695; People vs. Carpenter, 24 New York, 86.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an information in the nature of a *quo warranto,* the relator, Haley, claiming the right to hold and exercise the powers and franchises of the office of Mayor of Fernandina as against the respondent, Stark, who now holds and executes the said office as he, Haley, relates, unlawfully and without legal warrant or authority.

On the 4th day of April, A. D. 1881, at an election held in pursuance of law, Haley was elected to the office of Mayor. He qualified and entered upon its duties. This election was held under a municipal, corporate organization had under the general act providing for the incorporation of cities and towns, which was then in force. On the 24th of February, A. D. 1881, the Legislature passed an act entitled "An act to repeal and dissolve municipal corporations under certain circumstances, and to provide the manner in which such cities may become re-incorporated;"

Chapter 3316, Laws. Under its provisions the respondent, Stark, was appointed Mayor of the city of Fernandina, and, after qualifying, entered upon the discharge of the duties of the office. The relator insists that this act dissolving the old corporation and creating the new one, under which respondent was appointed, is unconstitutional; while the respondent maintains that the act is within the constitutional power of the Legislature, and that his title to the office is legal. It is thus apparent that the question here involved is the constitutionality of the act mentioned.

The act provides for a dissolution of municipal corporations *having a bonded indebtedness, the bonds to be passed due and unpaid, a fund for their payment not having been provided,* in the manner following: On the written application of the holders or owners, or their agents, of one-half of the unpaid bonds of the city to the Judge of the Circuit Court of the Circuit in which the city is situated, accompanied with satisfactory evidence that the city is *prima facie* bonded, and that the bonds "are passed due and unpaid and for which a fund for their payment has not been provided, it shall be his duty to make a certificate of such facts, and cause the said application, proofs and certificates to be filed and recorded in the office of the Clerk of the Circuit Court for the county in which the city is situated." On the presentation of a certified copy of this certificate to the Governor of the State, he is to issue a proclamation declaring that the charter of the city is repealed and the corporation dissolved. The act then provides for the incorporation of such dissolved corporation, which is to be had in the manner following: On the petition of twenty or more persons residing within the limits of the city thus dissolved, it is made the duty of the Governor to appoint a Mayor and five Aldermen, residents of such city. They are to hold their offices for two years, and in case of va-

cancy the office is to be filled by the Governor. The municipal corporation thus organized is called a provisional municipality, but it is in fact a permanent government. Its boundaries are to be the same as those of the dissolved corporation, and it is to have all the powers of the antecedent corporation so far as they existed under the act establishing a uniform system of municipal government, and its amendments. Under this new organization, the Mayor and Aldermen appoint the City Marshal and Clerk, who is to act as Treasurer. Each of these officers is required to give bond. The Mayor and Aldermen are authorized to compromise and settle the existing indebtedness of the defunct corporation, having authority to issue bonds for that purpose, and there is an appropriation of one-half of one per cent. of the revenue of the city authorized by law to the payment of this debt.

Upon the County Commissioners of the county is devolved the duty to hear and determine applications for the correction of assessments of property, and the Tax Collector of the county is made the Collector for the city.

Under the existing system of municipal government applicable to all cities, and which was the system obtaining in the city of Fernandina and all municipalities having 300 registered voters at the passage of this act, the Mayor, the Marshal, City Clerk, Treasurer, Assessor and Collector of Taxes are elected by the people for the term of one year, and while the Aldermen are elected for two years, one-half are elected each year with a term of office of two years, one-half of the old board thus holding over each year.

If the present act is effective, it is thus seen that we have two essentially different kinds of municipal government operating in cities of the same class, as fixed by the original act and its amendments creating the system. In one the officers are appointed and hold their offices for two years.

In the other, except as to Aldermen, they are elected and hold their offices for one year, and as to the Board of Aldermen they are essentially different in their organizations, in that, under the one system they hold for two years each from the same date, while in the other one-half go out each year.

In view of the plainest deductions and conclusions which follow the application of a simple, honest judgment to these facts, can it be said that that is a uniform system of municipal government in which such plain differences may exist in cities in the same situation and the same class? Can it be said that a uniform system of municipal government is *established* by this legislation? On the contrary, it is plain that the Legislature by its action, instead of *establishing* a uniform system of government for cities having a bonded debt, past due, for which payment has not been provided, places it within the discretion of the holders of one-half of the city's bonds and twenty persons residing within its limits, to fix the character of its government, to say whether its Mayor and Aldermen, its Marshal, its Clerk, its Treasurer, shall be elected by the people or appointed by the Governor, and whether the assessment and collection of its revenue shall be done by its own officers or by officers of the county in which the municipality may be situated.

The Constitution, which is a limitation upon the powers of the Legislature, not a grant of powers to it, provides that "the Legislature shall establish a uniform system of county, township and municipal government," and any action of that department of the government which destroys the uniformity of a pre-existing system, and permits and authorizes, in cities similarly situated, systems of government differing essentially in the manner of the selection of officers, their terms of office, and the manner of the asssessment and collection of revenue, cannot be sustained. There

may be ten cities in the precise situation of the city of Fernandina, with reference to population, to indebtedness and in all other respects, and yet, dependent upon the action of one-half of its bond-holders and twenty residents, five of them may continue under the elective system of municipal government and four of them, through the action of some of their creditors and residents, may adopt the system of appointment by the Governor.

The Legislature instead of establishing a uniform system of municipal government leaves it to the discretion of twenty residents and one-half of the bond creditors of corporations to fix the character of the government. The Legislature must so act as to *itself establish,* first, a system of municipal government; and, second, the system must be a uniform system. The Constitution limits its power as well as fixes its duty in this respect in plain and unmistakable terms.

We see no necessity for elaborating these propositions. The authorities, so far as they have any application to the questions determined here, sustain without exception the conclusion we reach, and we are without the least doubt in the premises.

The only other matter which we deem it necessary to consider, is the proposition that while such portions of the act as provide for the reorganization of the municipality may be unconstitutional, that part which authorizes the dissolution may be effective. This question we must consider, because upon its solution depends the right of the party claiming title under the general act for the incorporation of cities, and under the act regulating proceedings in *quo warranto,* (Chapter 1874, Laws,) we must determine the right of the claimant here, and so enter judgment.

The rule, as announced by Judge Cooley and established by the authorities, is: "If a statute attempts to accomplish

two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, consideratons or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect, the Legislature would not pass the residue independently; then, if some parts are unconstitutional, all the provisions which are thus dependent must fall with them." Can we give this act effect as an act to dissolve municipal corporations? Is such a conclusion consistent with the legislative intent? The title of the act shows its purpose to be to dissolve and to re-incorporate. A general statute (Chapter 3317, Laws,) passed at the same session of the Legislature with this act, provides a general method by which municipal corporations may surrender their franchises. That method is by a favorable vote of two-thirds of the voters voting at an election called to determine that question. The dissolution provided for here in the statute being considered is but a condition precedent, and a means by which a reorganization was to be rendered necessary.

The legislative intent here was to give cities indebted in the manner stated in the act a new form of municipal government with peculiar and special powers, by which they might compromise and settle their debts. The dissolution was provided for simply as a method by which to reach that end. It was not the purpose to dissolve if the reorganization was not to be had. The power to dissolve was given simply as an initiatory step to the contemplated reorganization, and if the reorganization in the man-

ner provided cannot be had, then those provisions of the law, which are in the statute simply as a means and method to accomplish this primary purpose of the act, must fall also. The whole of this act must fall "unless the portion not opposed to the Constitution can stand by itself," and it is evident "that, in the legislative intent, it was not to be controlled or modified in its construction and effect by the part which is void."

Our conclusion is that the entire act must fall. In what we have said it must be understood that we do not decide or hold that the Legislature can, under the Constitution, authorize the holders of one-half of the bonds of an indebted corporation to dissolve such corporation; nor do we mean to say that the act, stripped of the discretion vested in the bondholders, would be constitutional. We decide the precise case before us—nothing more. We say that even if such power exists, it is here so exercised that it cannot be given effect and operation.

Judgment of ouster against the respondent.

THE STATE OF FLORIDA EX REL. RICHARD JORDAN VS. T. E. BUCKMAN, RESPONDENT.

1. Where the language of a Constitution or statute is clear, plain and without ambiguity, effect must be given to it accordingly.
2. A conviction of petty larceny disqualifies a person from voting in this State.

This is a writ of mandamus brought against the respondent, as Clerk of the Circuit Court of Duval county, to compel him to restore Jordan's name to the registration list of that county, from which it had been erased by the County Commissioners, or to register his name thereon. The alter-

native writ shows that Jordan's name was erased and he denied the right to vote at the election in 1880, because he had, previously in the same year, been tried before a Justice of the Peace, and found guilty by a jury, of a charge of larceny of property of less value than five dollars, and sentenced by the Justice of the Peace to pay a fine of ten cents and costs.

The respondent moved to quash the writ on the following grounds:

1. The writ shows that the said Jordan has been duly convicted, adjudged and sentenced guilty of the crime of larceny by a court of competent jurisdiction in the State of Florida.

2. The writ does not show that the said Jordan is entitled in law to have his name restored to the registration list of Duval county.

George P. Raney, for the motion.

H. Bisbee, Jr., contra.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The relator in this case was convicted of petty larceny, as defined by the statute controlling the subject. This conviction was had through a prosecution before a Justice of the Peace, according to statutory regulations, and not "on presentment and indictment by a grand jury." Upon application made after this conviction to the Clerk of the Circuit Court in the county in which he resided (Duval), and in which he was entitled to register, if his conviction of petty larceny did not destroy that right, he was denied registration upon the ground that, under the Constitution and laws of this State, his conviction of petty larceny did destroy his right to vote.

The relator, while admitting his conviction of the crime stated, affirms that a conviction of petty larceny does not disqnalify him, and seeks, at the hands of this court, a peremptory writ directing the Clerk to place his name on the registration list. The question here, therefore, is whether, in this State, a conviction of petty larceny, in a trial before a Justice of the Peace, disqualifies the person so convicted from voting. The clauses of the Constitution and statutes controlling the subject are as follows: Section 8 of the "Declaration of Rights" provides "that no person shall be tried for a capital or otherwise infamous crime, except in cases of impeachment, and in cases of the militia when in active service in time of war, or which the State may keep, with the consent of Congress, in time of peace, and in cases of petty larceny under the regulation of the Legislature, unless on presentment and indictment by a grand jury."

Section 23, Article IV., provides that no person "convicted of bribery, forgery, perjury, larceny or other high crime, unless restored to civil rights, shall be permitted to serve on juries."

Section 2, Article XIV.: "No person under guardianship, *non compos mentis* or insane, shall be qualified to vote at any election; nor shall any person convicted of felony be qualified to vote at any election, unless restored to civil rights."

Section 4, Article XIV.: "The Legislature shall have power, and shall enact the necessary laws to exclude from every office of honor, power, trust or profit, civil or military, within the State, and from the right of suffrage, all persons convicted of bribery,perjury, larceny or of infamous crime," and the Legislature, in 1868, enacted that "persons hereafter convicted of felony, bribery, perjury, larceny, or other infamous crime, shall not be entitled to vote." *Section*

6, Chapter 1625, Laws. The Legislature has also attached to the crime of petty larceny a punishment which makes it a misdemeanor, the Legislature having enacted that only those crimes punished by imprisonment in the State Penitentiary are felonies, and petty larceny is not thus punished.

In view of these sections of the Constitution, and these statutory provisions, we think the plain and clear result is that a person convicted of petty larceny is not a qualified elector in this State. The term "larceny," as used in all of these sections, embraces petty larceny, and petty larceny, so far as its nature is defined by the Constitution, is, under section 8 of the Declaration of Rights, an "infamous crime." In our judgment, a resort to the first and simplest rule of construction, which is, that when the language of a constitution or statute is clear, plain and without ambiguity, effect must be given to it accordingly, is all that is necessary. The language being clear and plain, there is no uncertainty to be explained. The Legislature may, or may not, under this Constitution, so legislate as to annex to petty larceny the punishment of a misdemeanor, but neither such a statute, nor any other which the Legislature might pass, can disconnect from it that punishment which the Constitution makes it the duty of the Legislature to annex to it, which is disqualification to vote.

The writ is quashed.

BENJAMIN R. PITT, PLAINTIFF IN ERROR, VS. W. J. ACOSTA, DEFENDANT IN ERROR.

1. Under a contract for building a house, payments periodical except the last, for which the owner was to give the builder his note due

in six months after completion of the building, one furnishing material to the builder having filed a lien cannot maintain a suit against the owner to enforce it before the expiration of the six months, though the owner refuse to give the note to the party claiming a lien.

2. In such case the party having a lien upon the building cannot exact a note payable to himself.

3. Where, by the contract for building, payment is to be made by note due in six months after completion, and party refuses to give the note, the present right of action is for damages for the breach of the contract, and this cannot be maintained by a person not a party to the contract, but who seeks to enforce a lien upon the building contracted for. The latter can maintain suit to enforce his lien only after the expiration of the credit mentioned.

Writ of Error to the Circuit Court for Escambia county.

Plaintiff in error, who was plaintiff below, furnished material to the extent of $265.03, with which Pickard, one of the defendants below, constructed a house for defendant, Acosta, on Acosta's land. The house was completed about the 1st of May, 1879. On the 12th June, 1879, plaintiff in error began this suit against both Acosta and Pickard, alleging the foregoing facts, and that he had fixed the liability of Acosta and of the land, in the manner prescribed by the mechanics' lien law. Pickard did not appear, and a default was entered against him. Acosta appeared and pleaded. Demurrers to all of the pleas except the first were sustained. The first plea denied merely "that any balance to be paid by this defendant (Acosta) to the said Pickard was * * * at the time of the institution of this suit, due and payable and collectable by either the said Pickard or the plaintiff, or by any one, from this defendant." Plaintiff took issue upon this plea. All the other allegations of the declaration not being denied were admitted, and the issue made by the above plea and the joinder of issue thereon was the only one at the trial. Upon this

issue the plaintiff was allowed to prove, in addition to the facts admitted by the pleadings, that the house was built by Pickard under a written contract with Acosta, by which the building was to be paid for by instalments, the last two hundred dollars when the house should be completed and delivered, "by note on six months time without interest," &c. That before the house was completed Acosta, upon notification that Pitt had furnished the materials, agreed with Pickard, Pitt consenting, to give the note for $200 to Pitt. That upon the completion of the house, Acosta owed Pickard $200 on the contract and $58 for extra work on the building. He paid $25, and Pickard agreed to give him a release in full, if he would give Pitt the note for $200, which he agreed to do. That Pitt called upon him a day or two afterwards and asked him for the note.

Plaintiff offered, but was not allowed, to prove that when he called upon Acosta, Acosta refused to give him the note for $200 at six months, but offered to give him one for $150 at the same time. That Pitt refused the latter and immediately filed his lien, and gave the statutory notice to Acosta; and that Acosta had never paid him nor given him the note for $200.

Acosta demurred to the evidence, the demurrer was sustained, and judgment rendered for him, and Pitt prosecutes this writ of error to reverse the judgment, assigning as error the refusal to admit the testimony offered and the sustaining of the demurrer to the evidence.

W. A. Blount for Plaintiff in Error.

The question presented is whether or not Pitt, at the institution of the suit, had a present right of action against Acosta, under the mechanics' lien law. This question is resolvable into two others.

1. Did Pickard have, at the institution of the suit, a present right of action against Acosta; and

2. Had, at that time, such right been transferred to Pitt?

1. Plaintiff in error contends that Pickard then had two present rights of action against Acosta. The agreement to give and to receive the note had been broken by Acosta, and the breach gave Pickard an immediate right to sue.

a. Upon the contract for the contract price. Lutz vs. Ey., 3 E. D. Smith, (N. Y., C. P.,) 621.

Indebtedness by reason of non-payment of the contract price is admitted. An indebtedness would, in the absence of an express agreement to give time, become due and payable at once upon a full rendition of the agreed service. The service had been performed, but Acosta had the right to postpone the time of payment by giving a note. The extension of the credit was upon the condition that the note should be given, and upon a refusal to perform the condition, the indebtedness remained due and payable.

Acosta had the privilege of paying in cash or by note. He refused to give the note and thus elected to pay cash. He could not withdraw this election, and Pickard had a right to sue immediately for non-payment of the cash. Rugg vs. Weir, 16 C. B., N. S., 477.

I am aware of certain old English authorities which hold, in the analogous case of a sale of goods, that an agreement that payment may be made by note, is an agreement for a credit till the agreed maturity of the note, and that, even if the note be not given, no action for the price of the goods lies until the time when the note would have matured, had it been given. I am not aware, however, that these authorities have been followed in this country, and the reasoning upon which they are based is entirely technical and is unsatisfactory, giving, as it does, to the breaker

of the contract, immunity from action for the price of the goods which he has received, and extending to him the same credit whether he keeps or breaks his contract by giving or refusing to give the note. Acosta, by his refusal, refused to perform the condition upon which present payment, implied by law, could be made future payment, and therefore Pickard had an immediate right of action for the failure to make present payment.

b. For damages for a refusal to give the note. Hanna vs. Mills, 21 Wend., 90; Rinehart vs. Olewine, 5 W. & S., 157; Hutchinson vs. Reid, 3 Camp., 329.

In which action the damages would be precisely the same as in an action for the unpaid contract price, *i. e.*, the face of the note which should have been given. Hanna vs. Mills and Rinehart vs. Olewine, supra.

This right of action would mature at once upon the refusal to give the note, and consequently had matured at the beginning of this suit.

2. (*a*.) The court below and the defendant in error denied the existence of a right of action in Pickard on the contract until the maturity of the note which should have been given, and therefore the question as to the transferability of such right did not arise. Had it arisen there could have been but an affirmative answer, for the admission of a right of action in Pickard on the contract for the agreed price, is an admission of the right in Pitt, for the primary object of the statute, so far as it confers rights upon the material man, is to transfer to him the right of the contractor to enforce payment from the owner under the contract.

(*b*). The defendant below admitted Pickard's right of action for Acosta's refusal to give the note, but denied that such right passed to Pitt by the service of the notice upon Acosta; upon the theory, evidently, that this was a breach of an obligation outside of the contrac , and that Pitt could

acquire only rights arising from a breach of the contract by Acosta. But the agreement to give the note was a part of the contract. The refusal to give it was a breach of the only part of the contract that remained to be performed by Acosta. Pickard had performed all of his contract. It was payment only in which Pitt was interested, and the service of the notice transferred to him Pickard's right to bring suit in case of non-payment in the contract made.

But even were the contract to give the note a substitutionary contract, the right to sue for a breach of it would pass to Pitt.

The proceeding to transfer the liability of the owner from the contractor to the material man is a garnishment proceeding. Ferguson vs. Buck, 4 E. D. Smith; Cahoon vs. Levy, 6 Cal., 295; McAlpine vs. Duncan, 16 ib., 127. The only difference, I apprehend, between this and a garnishment proceeding is, that the service of the writ of garnishment subrogates the plaintiff to all rights which the defendant may have to enforce in the present or future any contractual liability of the garnishee, and the service of the statutory notice only subrogates the material man to such rights of action, present or future, as the contractor may have against the owner for any default in his obligations arising from the contract for the construction, or from the construction, of the building for which the materials have been furnished. The character of the rights is not different, but in the latter case they are limited by the relation which they must bear to the subject-matter of the contract, express or implied, between the owner and contractor, for the erection or repair of the structure. But, within the scope of this relation, the subrogation of the material man, after service of the statutory notice, is as complete as the subrogation of the plaintiff in garnishment, after service of the writ of garnishment. The garnishment binds all in-

debtedness of the garnishee to the defendant, whether arising from an original or a substituted obligation, and the service of the material man's notice binds all indebtedness from the owner to the contractor, arising out of the contract, or service, of building, whether the indebtedness at the moment of the service of the notice, has accrued from a breach of the original contract between the owner and contractor, or from the breach of a substituted obligation. Whether the obligation be original or substituted, the basis of the indebtedness is the erection or repair of the building for which the material man has furnished materials. If the indebtedness for such erection or repair still exists at the time of the service of the notice, then the notice binds it, no matter what form it may have taken as between the owner and contractor. The material man has no concern in the form of action which the contractor has against the owner. He is only concerned to know that a right of action, *ex contractu*, arising out of the construction of the building, exists in the contractor against the owner.

Were it otherwise the owner and contractor might at any time, by changing the form of contract, although the indebteness still remained, divest the material man of all right against the owner or his property. After the indebtedness exists, the material man's right to subject it to his claim can be extinguished only by payment or release before the service of his notice.

If Pickard's right of immediate action for the refusal to give the note did not pass to Pitt, but Pickard's right of action upon the contract, at the maturity of the note agreed to be given and received, did pass to Pitt, as was admitted by defendant below; then, after the service of the notice, one right of action existed in Pitt and one in Pickard. Both these rights of action, however, arose from the same cause, and judgment obtained upon one would extinguish

the other. Pickard might very readily obtain judgment upon his before the expiration of six months, and the judgment would be pleadable in bar to Pitt's action when brought. So would a payment to Pickard of his right of action, or a release thereof by him. Were this true, then the owner and contractor would be able to modify or destroy the rights of the material man, even after the service of the notice; and were it not true, the owner could be made to pay the indebtedness twice—once to Pitt and once to Pickard.

The court will repudiate any doctrine which requires it to admit such consequences as the legitimate results thereof.

But, even if the plaintiff in error was not entitled to a judgment for the $200, yet he was entitled to a judgment for $33. Pickard establishes an indebtedness at the completion of the building of $258—$25 was paid before Pitt gave notice to Acosta, and excluding the $200, which was to be covered by note, there still remained $33, which was due and payable at the beginning of the suit, and for which judgment should have been rendered.

The foregoing argument covers all the assignments of error, for if the theory of the plaintiff in error that the refusal of Acosta to give the note gave a present right of action to Pickard which had passed to Pitt at the institution of the suit be correct, then the evidence to establish such refusal should have been admitted and the demurrer to the evidence overruled.

E. A. Perry for Defendant in Error.

The court did err in sustaining objections to 9th, 10th, 11th and 12th interrogatories to Pickard, and his answers thereto. They were irrelevant, for they in no wise tended to prove plaintiff's side of the issue; *i. e.*, that if there was

any balance at any time to be paid by defendant, that it was due and payable and collectable on the 12th day of June, 1879.

They were incompetent. A parol promise by Acosta to make a note to Pitt would have been void under the Statute of Frauds. Phillips on Mechanics' Liens, §213. Cites McDonald vs. Dodge, 10 Wis., 106. And such parol promise could not be the ground of any action. Pike vs. Irwin, 1 Sanford, N. Y., 14.

Much less would evidence that Acosta promised to give to Pitt evidence by a promissory note that a certain balance would be due, payable and collectable six months from the 1st of May, 1879, be evidence that such balance was due and payable and collectable one month and twelve days from the 1st of May, 1879.

The same as above can be said as to the court's excluding the proffered testimony of Pitt.

Clearly the first and second assignments show no error.

Nor did the court err in sustaining the demurrer.

The plaintiff's evidence not only did not sustain his side of the issue, *i. e.*, did not show that any balance at any time to be paid by Acosta to Pickard was due and payable and collectable at the time of the institution of the suit, but it showed conclusively the reverse.

The contract, which was part of the plaintiff's evidence, expressly shows that any such balance was to be on credit of six months.

Pickard himself could not have enforced the payment of such balance until the same by the contract became collectable. Pitt, between whom and Acosta there was no privity, certainly could not exact from Acosta what his contractor could not exact.

"Owner cannot be required by sub-contractor to make payment until the moneys become payable by the terms of

his contract." Phillips on Mechanics' Lien, §209; Pendleburg vs. Meade, 1 E. D. Smith, N. Y., 728; Cronk vs. Whittaker, ib., 647; Trustees of Wylly Academy vs. Sanford, 17 Fla., 162.

If there was any right of action, either in Pickard as contractor, or in Pitt as sub-contactor vs. Acosta, clearly under the contract and the evidence introduced and proffered, it was not an action for any unpaid balance of the contract price; for that was to run for four and one-half months after the time of the commencement of this action—but probably an action for specific performance, or for damages for non-performance.

It was not a case of election, as in Rugg vs. Weir, 16 C. B., N. S., 477. Acosta could not have forced Pickard to take cash instead of six month's note, for such election was not given by the contract.

Acosta might have been sued on the 12th day of June, or before, for breach of his special agreement to give a note, and it would have rested with the jury to fix the damages arising from that breach, but he could not be sued for any balance for which he had only contracted to give a six month's note, until the credit expired. Mussen vs. Price, 4th East, 147. "Goods sold and delivered upon an agreement to be paid for by a present bill payable at a future day, does not create a present debt." Hoskins vs. Duperoy, 9th East, 498.

But there was no issue before the court that involved any question of breach of the contract, and the court and the jury could only try, and admit testimony pertinent to, the issue made by the pleadings. An issue could not be improvised by the court.

The issue was not whether any damages for breach of contract or any amount of work extra the contract was due at the time of the institution of the suit, but whether "any

balance under the contract" was at that time due, payable and collectable.

As to the manner in which the demurrer to the evidence was interposed, and the court's proceedings thereupon, no point is made in plaintiff's assignment of error, and under rule 8 of this court, those proceedings need not be examined.

But the court below had before it the case of Hinote vs. Simpson & Co., 17 Fla., 444, and the proper practice, as there indicated, seems to have been strictly pursued. The judgment of the court below should be affirmed with costs.

THE CHIEF-JUSTICE delivered the opinion of the court.

The liability of Acosta to Pickard was, under the original contract, to pay him by a note at six months. The money was not to be paid until after six months. Pitt did not by furnishing Pickard the materials to build a house for Acosta, and filing his lein, acquire a right under the contract to compel Acosta to give *him* the note, nor did Pitt acquire a present right to sue Acosta for the money by reason of a breach of the contract by the refusal to give the note to Pickard. Pitt had no right of action against Acosta on the contract.

By virtue of his lien, he had under the statute a right to the money, to be paid when it would become due, by the terms of the contract, and to collect it out of the property. Chapter 3042, Laws 1877.

When the lien attached, and Acosta had notice of it, he could not satisfy Pitt's lien by giving his note to Pickard, yet this would have been a compliance with his contract, and no action could have been maintained by Pitt upon the contract. Pitt's suit was brought to enforce his lien to the extent of the amount due, or to become due, from Acosta.

With the contract he had no concern, except as it fixed the time of payment and the amount. Pitt was therefore not entitled to a note, nor does he sue to compel the giving of a note according to the terms of the contract.

The convention of the parties after notice of the lien, as shown by the testimony, did not change the status, nor did the unexecuted naked agreement that the note should be given by Acosta to Pitt for the $200 at six months give a right of action recoverable under his declaration in this proceeding to enforce a furnisher's lien. If there arose any present right of action by Pitt against Acosta, it was not by virtue of the original contract but under the new agreement, but this is not the subject of this suit. The verbal promise of Acosta to give a note to Pitt instead of Pickard, thus paying so much of Pickard's debt to Pitt, leaves the parties *in statu quo*. This new agreement, and the consideration and compromise leading to it, were at most evidence of the amount unpaid and to be paid on the original contract and the extent of the lien. Pitt suffers nothing by failing to get the note. His lien, if valid, authorizes him to enforce it against the property within twelve months after the expiration of the credit, and his security meantime is good.

It is insisted that the defendant having refused to give the note to Pitt, he has a present right of action to sue for the money. But none of the authorities cited warrant this conclusion. There was no election reserved in the contract to pay the money or give a note, the contract calling on defendant to give his note to Pickard. Pickard was the only party entitled to sue for damages for the refusal to give the note (the only breach), and he was perhaps estopped by the filing of the lien and notice to defendant thereof. For authorites sustaining the foregoing position refrence is made to the briefs of counsel on both sides.

The plaintiff, in conclusion, claims that even if he was not entitled to a judgment for $200, yet he was entitled to a judgment for $33, because Pickard's testimony establishes an indebtedness at the completion of the building amounting to $258, $25 of which was paid before Pitt gave notice to Acosta, and excluding the $200, covered by the note, there still remained $33 due and payable at the beginning of the suit, and for which judgment should have been given in plaintiff's favor.

It is true that Pickard states the amount due him at $258 on account of extra work, &c., but at the conferences of the parties it appears Acosta claimed certain deductions on account of defects in the building, and the amount was compromised at $225, of which $25 was paid to mechanics before the lien of the plaintiff attached, and there is nothing in the evidence to show that this compromise was not just. All the testimony given was on the part of plaintiff.

The result is, that the testimony offered failed to show a present right of action against the defendant, Acosta. The testimony of the plaintiff was properly refused, and the demurrer to all the evidence offered by the plaintiff should be, as it was, sustained.

The judgment is affirmed.

BENJAMIN F. TIDWELL, APPELLANT, VS. ROBERT M. WITHERSPOON, APPELLEE.

1. That a paper purporting to be a copy of a summons served by the sheriff was not a true copy of the original on which a return of service was made, is not good ground of motion to dismiss the suit, but only to set aside the return of service, if the defect or variance is material.
2. A sheriff's return of due service of a summons in the manner pre-

scribed by law is conclusive as to jurisdiction of parties, unless the same is impeached by satisfactory evidence.

3. Where an attorney appears "specially, not waiving the right to take advantage of errors and defects in the summons, or to move for a dismissal of the cause on account thereof," this is not a general appearance waiving the very defects indicated.

4. Where a clerk has entered defendant's appearance by an attorney, and the attorney testifies that he did not authorize such entry, which statement is not contradicted, the clerk's memorandum cannot bind the attorney or the party.

5. Where a default is entered for want of a plea, and there is sufficient cause shown for setting it aside and granting leave to plead, and an order is made to plead instanter, if the time allowed is not sufficient, application should be made to the court to enlarge the time. The judgment of the attorney that more time is necessary is no legal excuse for non-compliance with the order.

6. The neglect of an attorney to file a plea under a rule of court fixing the time of pleading, should not operate to the prejudice of the party on his application to set aside a second default, upon his tendering a good plea and an affidavit of merits with a sworn statement showing that he is without fault, especially where the neglect of the attorney was not such as to give a right of action against him for negligence.

7. The neglect of an attorney to prepare and file a plea, caused by his being summoned to a distant place on account of the serious illness of his wife, even though he might have made arrangements with another attorney to prepare it, or might have notified his client, yet did not do so because of his anxiety for his family, is not such neglect as should operate to the prejudice of his client.

8. While the granting or refusal of an application to open a default for not pleading is in the sound discretion of the court, yet this discretion is the subject of review on appeal.

9. The taking of original records or papers from the clerk's office by attorneys without leave of the court is reprehensible, and should not be permitted by the clerk.

Appeal from the Circuit Court for Madison county.
The facts of the case are stated in the opinion.

J. N. Stripling for Appellant.

F. W. Pope for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Witherspoon commenced suit against Tidwell for libel and slander; summons was issued June 25, 1880, and not served; an *alias* was issued July 20, returnable at August rule day, and served July 21; an entry was made July 29 by the clerk that the defendant appeared by E. M. Cheney, his attorney; July 31, Mr. Cheney entered his appearance in writing "specially, it being understood that defendant does not waive the right to take advantage of errors and defects in the summons issued in said cause and in the service thereof, or to move for a dismissal;" for these causes, September 6, default was entered for not pleading.

At October Term, 1880, Cheney, for defendant, made a motion to dismiss the suit on the ground that the copy of *alias* summons served was not a copy of the summons on which the sheriff had returned served. The copy read to the court was dated July 20, returnable at July rule day. Mr. Cheney also read his affidavit that he had not entered or authorized the entry of his appearance for defendant on July 29th, but had only appeared specially July 31 according to the written appearance on file, and did not know until after default was entered that the docket showed an entry of his general appearance. There was no question raised that the copy of the *alias* summons read was the copy served, except by the sheriff's return on the *alias* that he had served a copy thereof on defendant; but it was not proved that the copy presented was the paper served by the sheriff on the defendant. The court denied the motion to dismiss the suit on the 20th of October in term time, but opened the default and defendant was allowed to plead, provided he plead instanter, upon payment of costs. De-

fendant not having filed a plea, a second judgment by default was entered by the clerk November 1, 1880.

December 20, 1880, defendant filed his petition to open the second default, stating on oath that he had employed Mr. Cheney as his attorney, and placed the matter of his defence in his hands; that Mr. Cheney returned to his home in Jacksonville, promising to prepare and send the plea by mail forthwith to be filed under the order of the court; that not hearing from Mr. Cheney he wrote him several times inquiring the cause of the delay, at which delay he was surprised until he afterward learned that his said attorney had been summoned to go to New York by telegraph on account of the severe illness of his wife, of which facts he was not informed until the day of filing his petition; and that he had a just and valid defence to the action, and that the delay was not caused by his own neglect.

On the hearing of the petition to open the said second default the affidavit of Mr. Cheney was filed, stating that he took the papers in the case to Jacksonville for the purpose of preparing a plea forthwith, but soon after, on the 25th of October, and before he had completed drawing up the plea, he was summoned to New York on account of the dangerous sickness of his wife, and for that reason he at once left all his business and went to New York, and the plea had not been completed so as to be filed immediately as he had intended, and no other attorney in Jacksonville was informed of the said matters of defence, and he had no time to explain them to another attorney before his departure, and had hoped to return very soon, but had been unable to return until the 19th of December, when he found letters from Mr. Tidwell informing him of the default, &c.; that the delay had been caused by circumstances beyond his own control and without intent to delay proceedings,

As to the entry of Mr. Cheney's appearance for the defendant, it is shown by his affidavit, and not denied, that he had not entered or authorized the entry of his appearance on the 29th July. Having entered his appearance July 31, for the special purpose of objecting to defects in the process, he cannot be held to have waived such defects by this special appearance. Standley vs. Arnow, 13 Fla., 51. If the court treated this appearance as a general appearance it was error. Under the circumstances here disclosed it would have been the proper practice to open the first default and give the defendant time to prepare his pleas. The declaration as it then stood, the third count not having been struck out, showed the necessity of some time and skill to plead, assuming that the defendant had deferred the preparation of his plea on account of the supposed defects in the summons.

The taking of the original papers from Madison Clerk's office to Jacksonville was reprehensible. No attorney has a right to take original records and papers from the Clerk's office, and the Clerk has no right to permit it to be done, whatever the common practice may have been, unless by special order of the Judge.

The neglect to file a plea in due time was not attributable to any fault of the defendant. He employed an attorney, and expected, as the record shows, that his plea would be prepared and mailed to him immediately. He was not responsible for the absence of the papers from the court-house, or for the delay in pleading, nor does it appear that he knew of the absence of the papers. Relying upon his attorney he was not necessarily guilty of negligence by reason of being himself an attorney. On the contrary he wrote repeatedly to his attorney to ascertain the cause of the delay in the preparation of his pleas, with the purpose of speedily complying with the order of the court. While

to the entry of Mr. Cheney's appearance for the de-
nt, it is shown by his affidavit, and not denied, that
d not entered or authorized the entry of his appear-
on the 29th July. Having entered his appearance
31, for the special purpose of objecting to defects in
rocess, he cannot be held to have waived such defects
is special appearance. Standley vs. Arnow, 13 Fla.,

If the court treated this appearance as a general ap-
nce it was error. Under the circumstances here dis-
it would have been the proper practice to open the
default and give the defendant time to prepare his

The declaration as it then stood, the third count not
been struck out, showed the necessity of some time
ill to plead, assuming that the defendant had deferred
paration of his plea on account of the supposed de-
the summons.

taking of the original papers from Madison Clerk's
Jacksonville was reprehensible. No attorney has
ht to take original records and papers from the
office, and the Clerk has no right to permit it to be
hatever the common practice may have been, unless
al order of the Judge.

eglect to file a plea in due time was not attributable
ault of the defendant. He employed an attorney,
ected, as the record shows, that his plea would be
and mailed to him immediately. He was not re-
for the absence of the papers from the court-
for the delay in pleading, nor does it appear that
of the absence of the papers. Relying upon his
e was not necessarily guilty of negligence by rea-
ng himself an attorney. On the contrary he wrote
to his attorney to ascertain the cause of the de-
preparation of his pleas, with the purpose of
omplying with the order of the court. While

and that defendant was not responsible for it. Deponent further says that in his opinion defendant has a valid and sufficient defence on the merits. With this affidavit was tendered a plea alleging a former suit for the same cause of action, a trial, verdict and judgment for defendant thereon, and also plea of not guilty to the first two counts, duly sworn to by the defendant.

The plaintiff filed an affidavit of his attorney's giving a history of the cause and alleging delays by the defendant and his attorney, the defendant also being an attorney-at-law.

The court refused to open the second default and allow the defendant's plea, and an inquest and assessment of damages was had and judgment rendered in favor of the plaintiff and against defendant.

The appellant assigns for error the ruling of the court in refusing to dismiss the suit for irregularities in the service of summons, and in refusing to open the default and allow the defendant's plea to be filed.

There was no error in refusing to dismiss the suit on the ground of a mistake in the copy of summons delivered to defendant, the original being regular and the sheriff's return showing proper service. The appropriate motion was to set aside the service on showing a material mistake in the copy served. The plaintiff then could his his *pluries* writ.

The original with the return being regular the record showed jurisdiction of parties. If it had been shown to the satisfaction of the court that due service had not been made, the court would have set aside the return. We do not think the evidence offered was sufficient to impeach the return of due service. Nobody on oath identified the copy presented as the paper served by the sheriff, though its identity was not disputed.

As to the entry of Mr. Cheney's appearance for the defendant, it is shown by his affidavit, and not denied, that he had not entered or authorized the entry of his appearance on the 29th July. Having entered his appearance July 31, for the special purpose of objecting to defects in the process, he cannot be held to have waived such defects by this special appearance. Standley vs. Arnow, 13 Fla., 361. If the court treated this appearance as a general appearance it was error. Under the circumstances here disclosed it would have been the proper practice to open the first default and give the defendant time to prepare his pleas. The declaration as it then stood, the third count not having been struck out, showed the necessity of some time and skill to plead, assuming that the defendant had deferred the preparation of his plea on account of the supposed defects in the summons.

The taking of the original papers from Madison Clerk's office to Jacksonville was reprehensible. No attorney has any right to take original records and papers from the Clerk's office, and the Clerk has no right to permit it to be done, whatever the common practice may have been, unless by special order of the Judge.

The neglect to file a plea in due time was not attributable to any fault of the defendant. He employed an attorney, and expected, as the record shows, that his plea would be prepared and mailed to him immediately. He was not responsible for the absence of the papers from the court-house, or for the delay in pleading, nor does it appear that he knew of the absence of the papers. Relying upon his attorney he was not necessarily guilty of negligence by reason of being himself an attorney. On the contrary he wrote repeatedly to his attorney to ascertain the cause of the delay in the preparation of his pleas, with the purpose of speedily complying with the order of the court. While

there may have been unnecessary delay in the preparation of the plea, the defendant should not be held to the penalty and disgrace of a conviction for slander and libel and damages for the default of his attorney, when his plea was tendered, duly sworn to, showing that the identical cause of action had been already tried between these parties, and verdict and judgment had been rendered in his favor. The affidavits of the attorney and of the defendant, and his sworn plea, were a sufficient affidavit of merits.

So far we have treated the attorney as entirely responsible for the delay, and we think he should have been more diligent in the preparation of the plea, knowing the terms of the order of the court. It was due to the court that if he wanted more time to prepare the plea he should have asked for it. And in the case of the necessity of his departure from the State he should have informed his client and the opposing counsel of that fact, but after he was informed, within three or four days after reaching home, of the dangerous illness of his wife, and feeling the necessity of his speedy departure to her bedside in a distant city, we cannot find cause for censuring any one for the ensuing delay, or for his obeying the instincts of humanity and duty.

We cannot find in this record evidence of gross negligence on the part of the defendant. Nor, under the circumstances disclosed in the record, can we conclude that the attorney would be liable to his client for culpable negligence.

Under the rule laid down in Waterson vs. Seat and Crawford, 10 Fla., 326, the court, in the exercise of a sound discretion, should have opened the second default and allowed the plea to be filed of record upon terms of payment of costs and submitting to a speedy trial.

While the granting or refusing of a motion to open a default is in the sound discretion of the court, yet this discretion is always subject to review, and in nearly every case

cited by counsel on both sides on appeal it was ruled that the judgment by default might be set aside and the defendants allowed to plead on proper terms. 29 Cal., 422; 1 Johns. Chy., 537; 29 Mo., 447; 17 Ala., 339; 1 Cowen, 42; 10 Fla., 326; 11 Mo., 438; 11 Ga., 654; 3 Johns., 141.

This cause is remanded, with directions that the defendant be allowed to plead on payment of the taxable costs which have accrued in the Circuit Court since the service and return of the summons, such payment of costs to be made to the Clerk of the Circuit Court within twenty days after notice of the taxation by the Judge of such costs, unless the defendant has already paid the same, and on such taxable costs being paid the Judge or court is authorized and required to vacate the final judgment and default, and allow the parties to file such pleadings or amended pleadings as they may be advised, and the cause will proceed according to the rules and practice of the court; but if such taxable costs shall not be paid, or have not already been paid by defendant, the said judgment will stand affirmed. The costs in this court will be taxed against the appellant.

LEONIDAS W. SPRATT, APPELLANT, VS. MILES PRICE, ET AL., APPELLEES.

1. Where, upon a general view of the case, giving the appellant every fair construction of the facts in his favor, an application of the principles of law controlling the matters involved justifies the judgment, it must be affirmed.
2. Where, in a common law action, a defence on equitable grounds consists of matter clearly available as a defence at law, the court, without motion, should strike it out. Such a defence is admissible only when it sets up matter which in the event of a judgment at law

equity would on account of the *equities set up* give him relief against the judgment, and if a party having a good defence at law fails to plead it in the action at law equity will not grant any relief against the judgment. Quere: Whether such a defence is admissible in an action of ejectment?

3. Under the statute of 1874 the lien for taxes assessed related to the first of March. Such lien attached to the *res* without regard to individual ownership, and when enforced by sale pursuant to the statute, the purchaser took a valid title in fee.
4. A purchaser at a tax sale has, during the period allowed for redemption, no estate, legal or equitable, in the land. He has a lien for the purchase money and interest allowed by the statute.
5. The owner, occupant, or other party subject to the assessment under the terms of the statute, is the proper person against whom to assess a tax during the period of redemption, and if a sale for taxes thus assessed is had after the period of redemption expires, and after the purchaser at the first sale has obtained a deed, a good title in fee passes to the purchaser at the second sale. The law gives no immunity to the purchaser at the first sale.
6. The terms duty and obligation are used in reference to taxes in two senses: the first being in reference to the sovereign imposing the tax, and the second in reference to individual relations. The matter of duty to the State is fixed by the legislative enactment imposing the tax. The matter of obligations between individuals arises from the legal or equitable relations of the parties *inter se*. In neither case is an obligation or duty fixed by the mere fact of ownership in the land.
7. Every person who has or claims an estate in land has not for that reason a claim or right against every other person claiming or having an estate in the land by which his adversary claimant is bound to pay the taxes.
8. Where the tax under which a second sale was had was assessed against a mortgagor in possession during the time allowed for redemption from first sale, there was no duty upon the part of the mortgagee out of possession to the stranger who had purchased at the first sale to pay this tax, and he could bid and acquire a good title at the second sale.
9. The general rule in ejectment is that any title acquired subsequent to issue joined must be set up by a plea *puis darrein* continuance. Where, however, no injustice is done, a tax deed in the hands of the original purchaser may have relation to the day upon which the

party was entitled to it, and if such day precedes the date upon which issue was joined it is admissible under the generai issue.

Appeal from the Circuit Court for Duval county.
The facts are stated in the opinion.

Cockrell & Walker for Appellant.

The tax sale at which Price became the purchaser was made necessary by his own default, he being the mortgagee of the lot, and as between him and the State, to whom the tax was due, it being his duty to pay it.

A purchase made when such a relation exists is made in wrong, and the law will conclusively presume, in circumvention of wrong, it was made in discharge of duty, not in repudiation of it. The universal principle is that a purchase made by one whose duty it is to pay shall operate as a payment only.

"Show the existence of the duty and the disqualification is made out in every instance." Cooley on Taxation, 346; 1 Aiken's (Vermont) Rep., 306, reported in 15 Amer. Decisions, 681; Blackwell's Tax Title, §399; 48 Miss., 209; 30 Ill., 102; 44 N. Hampshire, 475.

From the time of the assessment of the tax to the execution of the deed to Spratt, say a period of two years, it was not only Price's privilege but his duty to pay the tax. During this whole time the land which secured to him the purchase money from Comfort owed the duty to the State to pay the tax. And Price's privilege to pay the tax was secured by a covenant in the mortgage, enforcing his duty to pay it, and adding the amount to the mortgage debt. His tax title then enured to the protection, not to the destruction of the title held by the mortgagor and himself.

In the Connecticut Life Insurance Co. vs. Balte, the Supreme Court of Michigan say, through Judge Cooley: "It certainly cannot be said that the second mortgagee owes

any duty to the first mortgagee to protect his interest in the land. Neither on the other hand does the first mortgagee owe any such duty to the second mortgagee to protect his lien against the tax sale. *To the State* each of the three may be said to owe the duty to pay the taxes, and the State will sell the interest of all if none of these pay it. As between themselves the primary duty is on the mortgagor, but if he make default either of the mortgagees may pay, and one of the two must do so, or the land will be sold and his lien extinguished. * * * When, therefore, each mortgagee has the same interest in making the payment of the tax, and the same right to do so, and the same means of compelling repayment, it may well be held that a purchase by one shall not be held to cut off the right of the other, because it is based *as much upon his own default* as that of the party whose lien he seeks to extinguish."

This extract is thus liberally quoted to show that it is the duty the mortgagee owes to the State to pay the tax. The duty to pay the tax being shown, it follows that the attempted purchase by Price was in law merely a payment of the tax.

So Price regarded it, as he did not apply for a deed from the State, relying upon his old title to which he was restored by his purchase at mortgage sale, until nearly a year after the plaintiff commenced his suit.

If then it was Price's duty to pay the tax covered by the sale, under which he bought, the court erred in charging that the tax deed of latest date prevailed. This is true only when the party purchasing is under no disqualification to purchase.

But the charge asserted, as applied to the evidence, that, independent of the duty to pay the tax, the latest tax deed prevailed. Comfort himself could with as much propriety

bid in the lands at tax sale, and thereby have defeated the title of the plaintiff.

The second charge asserts that the relation of an attorney or agent *in and of itself* disqualified one from purchasing at tax sale. If this be the law it was only necessary for the so-called equitable plea to allege that at the time of the plaintiff's purchase he was the agent or attorney of Price.

If an agent or attorney pays out his own money in the acquisition of a tax title he certainly cannot be divested in law or equity of the security the legal title furnishes him for his reimbursement by any act of the principal until the money is restored to him.

The plaintiff requested the court to charge the jury as follows:

"The fact that the newspaper in which the advertisement of the tax sale is made was not filed, or did not remain on file in the Clerk's office, even if it has been proved that no such newspaper was filed, or remained on file in the Clerk's office, cannot affect the title of the purchaser."

The plaintiff also asked the following charge:

"The failure of the publisher or proprietor of a newspaper in which the advertisement was published to comply with the requirements of the tax law, after the sale to the purchaser, cannot affect the title of the plaintiff."

The refusal of these charges, construed in the light of the evidence before the jury, asserts the law to be that the validity of a tax title otherwise unassailable will be affected by the failure of the newspaper publishers to file in the Clerk's office copies of the papers containing the tax advertisement.

The tax law makes no such requisition upon the publisher; the law does not so expose the title of a purchaser

who has parted with his money to the caprice or negligence of the publisher.

The law under which this sale was had declares the deed shall be *prima facie* evidence of the regularity of the proceedings from the valuation of the lands by the Assessor to the date of the deed, inclusive, and the title of the purchaser, and that the validity of any sale for taxes shall only be affected by alleging and proving that the property sold was not subject to taxation, or that the taxes had been paid before such sale, or that the property had been redeemed according to law.

The U. S. Stat., (12 Stat., 640,) similar in terms, has been construed by the Supreme Court United States, 98 U. S. Repts., 517, and the act sustained. Nor is there any want of harmony between this case and the Dickinson vs. Acosta case, 15 Fla., 621, as to the points decided. Chief-Justice Randall there enunciates the unquestionable doctrine that property cannot be subjected to taxation except in pursuance of a levy duly authorized by law, which of necessity includes the listing, valuation and distribution or apportionment of the proper amount; and these last necessarily presuppose a taxing district defined by law.

We are content to accept the views announced in Dickinson vs. Acosta as indicating the things essential to the validity of a tax title.

The failure of the newspaper publisher to do what is required of him after the sale cannot be such an essential as affects the title of the purchaser.

The court further charged the jury that a title acquired by the defendant, after issue joined, though not set up under a plea of "*puis darrien continuance*," was available to the defendant. This we submit is error.

A title in the defendant acquired after the commencement of the suit is no defence thereto. 47 Barb., 595;

Justin vs. Faught, 23 Cal., 237; Moore vs. Tice, 22 Cal., 513.

As the court entertained the views that an after-acquired title was available, it was bootless to discuss whether the title under tax sale was vested in Price by the certificate of purchase or by the deed.

We may admit a sheriff's deed, the court exercising control over the returns and proceedings of its own affairs, under a fiction of law to prevent injustice being done.

But this case does not admit of the application of the doctrine of relation.

C. P. Cooper for Appellees.

1. The deed under which plaintiff claims title to the property involved in this action being a tax deed is only *prima facie* evidence of the regularity of the anterior proceedings conected with sale of said property for taxes, and all the pre-requisites must have been complied with to make it a valid deed. Acts of Fla. 1874, Chapter 1976, Sec. 60; Dickinson vs. Acosta, 15 Fla., 615; Blackwell on Tax Titles, 401.

2 The tax law of 1874 provides that "the proprietors or foreman of any newspaper publishing any notice of sale shall forward a copy of *each number* of his paper containing such notice to Clerk of the county." This is required in order that the evidence may be kept that the notice was published the number of times required by law, and all things connected with notice must be strictly complied with. Act of Fla., 1847, Chapt. 1976, Sac. 50; Blackwell Tax Titles, 237, 239, 274; Cooley on Taxation, 332 and note, 334, 337; Burroughs on Taxation, 293, 294.

3. The tax rolls show that this property was assessed as *Miles Price's* for taxes of 1875. Price sold to one Comfort September 17, 1875. Tax rolls show that thereupon the

assessment was stricken out to Price and these words written: "Sold to Comfort." Collector thereby relieved Price from paying the taxes, but subsequently *advertised* the *property as "Price's,"* and sold May, 1876, when Comfort was the owner. There was no proper assessment and no notice to Comfort, the sale is therefore illegal, and the plaintiff's deed obtained thereunder is void. Blackwell on Tax Titles, 114, 237, 274; Cooley, 259, 260, 334.

4. The testimony shows that F. F. L'Engle, who bought in the property and assigned his certificate to the plaintiff, who obtained his deed thereon, was at the time of said tax sale the agent of Comfort, the owner, and of Price,the mortgagee, and had their funds in his hands to pay the taxes. A sale to him was therefore void, and he obtained no title and assigned none to Spratt. Blackwell Tax Titles, 440; Burroughs' Taxation, 355; Cooley's Taxation, 347.

5. Equitable defences, specially permitted by the statute law of the State, can be pleaded in an action of ejectment, and our pleading and practice act does so provide. Laws of Florida, Chap. 1096, Sec. 69; Tyler on Ejectment, 565, 79*a*; Murray vs. Walker, 31 N. Y. Reps., 339.

6. L'Engle being at the time of his said purchase of said property the agent and attorney of Price in the matter of protecting his interests in said property by paying taxes, &c., occupied such a fiduciary relation to Price that if he obtained any title, and if said sale were a valid sale, said title was in trust for Price, whether he bought with his own or Price's money, and L'Engle but assigned to Spratt, if Spratt and L'Engle were not partners and both Price's attorney's and agents, this trust and any title held by Spratt is in trust for Price. Perry on Trust and Trustees, 139, and cases cited in note 3; ibid., 142, and cases in note 3 foot of page.

7. Price bought this property in suit from I. D. Hart in

1859. He held same until September, 1875, he then sold to one J. J. Comfort, and took a mortgage for part of the purchase money. L'Engle bought at tax sale 5th May, 1876, and assigned certificate to plaintiff, who obtained tax deed on 9th of June, 1877. Price to protect himself purchased the property at tax sale in July, 1877, (also under foreclosure September, 1877.) If Spratt obtained any title by his tax deed, it divested Price of any interest in the property, and he could purchase at a tax sale. Only those who have existing *interests* in the property or stand in some fiduciary relation, have the duty of paying the taxes and cannot obtain title by purchase at tax sale. Cooley on Taxation, 346; Burrough's Taxation, 352.

8. The expiration of the time allowed for redemption having arrived July, 1878, Price had a vested right from that date to a deed, and though his tax deed was obtained after the commencement of this suit, it relates back to said date of expiration of the time for redemption, and may be put in under the plea of the general issue. Jackson vs. Ramsey, 3 Cow., 75; Vin. Abr. Tit. Relation, 290; Burroughs' Taxation, 329; Blackwell's Tax Titles, 428, 429; Tyler on Ejectment, 470.

9. If matter which ought to have been pleaded is admitted in evidence by consent it will be as effectual as though pleaded. See Jackson vs. Demont, 9 Johnson's Reports, 95; Tyler on Ejectment, 465.

10. Objections to the admissibility of evidence must be made before it goes to the jury, and the grounds of those objections must be specifically *pointed out;* it is too late after the evidence is read to the jury. McKay vs. Lane, 5 Fla., 268; Carter vs. Bennett, 6 Fla., 337.

11. Titles acquired since the commencement of the action may be shown in defence. Tyler on Ejectment, 757; Mun-

sel vs. Sanford, 1 Root Conn. Rep., 257, in U. S. Digest, V., 155.

12. The plea of not guilty puts in issue the *title* to the land, and under it the defendant may show all and every evidence of *title* in himself, or any other than the plaintiff. Laws of Florida, Chap. 999; Roberts vs. Pillow, 1 Hempt's Rep., 674; U. S. Digest, Vol. V., 179; Zeigler vs. Fisher, 3 Penn., 367.

Price now holds the property under foreclosure (and sale) September, 1877, of the mortgage taken by him from Comfort for the purchase money of said property and also under his tax title of July, 1877.

If Price's tax deed had have been objected to at the *time of its introduction*, because it was not pleaded "*puis darrien continuance*," then defendant's attorney could have amended his pleadings so as to get in evidence said tax deed, but plaintiff's attorneys having only made their objection in argument it prevented defendant's attorney from so amending for the purposes of the trial.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an action of ejectment brought in the Circuit Court for Duval county by the appellant, Spratt, against the respondents to recover certain real estate with mesne profits. Defendants pleaded the general issue and a special plea on equitable grounds. Plaintiff took issue on the first and demurred to the second. The demurrer was sustained with leave to defendants to amend. This they did and interposed a plea on equitable grounds. After trial and hearing, and motion for new trial overruled, there was judgment for the defendants. From this judgment plaintiff appeals.

The equitable plea sets up substantially that Miles Price,

on the 14th of September, A. D. 1857, was, and still is, the owner of the land; that on that day he sold it to Jonathan J. Comfort, taking from Comfort a mortgage for a large part of the purchase money; that he foreclosed his mortgage and bought in the property under a decree rendered July 14, 1877; that except the time embraced between the 14th of September, A. D. 1875, and the 14th of July, A. D. 1877, he has always owned the land in fee simple; that on the 5th of May, A. D. 1876, Leonidas W. Spratt and Francis F. L'Engle were partners, and were the attorneys and agents of Miles Price and of Jonathan J. Comfort in respect to the property in controversy; that said firm for valuable consideration agreed to protect the interests of the said Price and Comfort by paying for them all taxes assessed against said property whenever the said P. & C. were unable to do so, and to buy in said property at tax sale if necessary to protect it, and to do all things necessary to protect the interest of Miles Price as mortgagee, Miles Price agreeing to repay them all sums that they might advance; that on the 5th of May, A. D. 1876, the property claimed was sold at a tax sale by the Collector of said county as the property of Miles Price, and that said Miles Price procured the said firm of Spratt & L'Engle to purchase said property for him, and that F. F. L'Engle purchased the same; that the certificate of sale, without the knowledge of defendant, was issued in the name of F. F. L'Engle, and that the said L'Engle afterwards assigned the certificate to plaintiff, and that afterwards, on the 9th of June, A. D. 1877, the plaintiff obtained in his own name a tax deed for said property; that since the date of the tax sale Miles Price has paid to the said firm of Spratt & L'Engle amounts of money aggregating about the sum of eight hundred and sixty-six dollars to reimburse them for the sum advanced at said tax sale. De-

fendants in this plea allege that the claim now made by Spratt is based upon this tax title.

We first dispose of the matter of this plea. The Circuit Court, upon the motion of plaintiff, or in the absence of such motion, should *sua sponte* have stricken it out. This plea as a defence to the action was a defence at law, available under the plea of the general issue. To permit it is to simply embarrass the trial and encumber the record. There is no doubt of the power of the Judge in a plain case to strike it out. 17 Fla., 631. Viewed in the light of a special plea, setting up a defence at law, such should have been the action of the Circuit Court. Viewed in the light of an equitable defence under the statute there is nothing in it. These equitable defences in common law actions are available only where they set up equities, which in the event of a judgment at law would entitle the defendant to relief against such judgment. Sec. 69, Chap. 1096, Laws. Here this defence is available at law, (26 Wis., 614; 7 Watts, 472; 31 Mich., 380; Cove on Tax., 347,) and in the event of a judgment equity would not enjoin the judgement for that reason. 2 Barb. Chy. Rep., 108; 3 John. Chy., 356; 94 U. S., 652.

We would remark further, in order to save the question, that under the English common law procedure act "defences on equitable grounds" are not pleadable in actions of ejectment. Here there may be a different rule in consequence of a want of similarity in the rules regulating pleading in ejectment under the English statutes and the law regulating it here. But this question is not material as the plea is plainly subject to the objections mentioned.

Thus disposing of these preliminary questions we reach the merits of this controversy.

The defendant, Price, was the admitted owner of the land on the first of March, A. D. 1875, the facts which de-

termined the person against whom was to be made the assessment for that year. Under the law the tax was properly assessed against him. Sec. 6, Chap. 1976, Laws.

On the 14th of September, A. D. 1875, Price sold the land to Comfort, taking a mortgage for the purchase money. On the 5th of May, A. D. 1876, the land was sold for the taxes of 1875, and F. F. L'Engle became the purchaser. Before the date for redemption expired, L'Engle assigned and transferred his certificate of sale to the plaintiff, Leonidas W. Spratt, and he, Spratt, on the 9th of June, A. D. 1877, received a tax title or deed from the County Clerk for the property.

This is the case which the plaintiff insists is made on his behalf. In reply to this case the defendant insists that L'Engle and the plaintiff were his agents under an agreement to pay these taxes for which the land was sold on the 5th of May, A. D. 1876, and that no title passed to plaintiff because the proprietor of the newspaper publishing the notice of sale failed to forward a copy of each number of his paper containing such notice to the Clerk of the county. This is the case of the defendant so far as it consists of an assault upon plaintiff's title. In addition to this, however, the defendant insists that, admitting the validity of the deed of the plaintiff, he has as against him a better title because of a subsequent purchase by him at a tax sale for the taxes of 1876.

The tax for that year was assessed against Price's mortgagor, Comfort, the assessment being made at a time when the plaintiff or his assignor was the holder of the certificate of sale for the taxes of 1875. Plaintiff's tax title was dated the 9th of June, A. D. 1877. The sale under the assessment against Comfort, at which Price purchased, was on the 3d of July, 1877, *after the date of the deed absolute to Spratt.*

The plaintiff insists that no title passed to Price under this second sale, because, as mortgaged, it was his duty to pay the tax, and that his purchase was simply a payment

Under this state of facts the defendant insists that while as to Comfort he may have ocuupied the relation of mortgagee, that as to Spratt and his deed and to the land he was a stranger, if the deed to Spratt was effectual to convey the whole estate.

If this position be correct, then it is an end of the case. To this consideration we address ourselves. The determination of this question involves an accurate appreciation of the nature of the reveune law of 1874, as well as the relation occupied by those acquiring interests under sales for taxes had thereunder.

Under the provisions of this act the tax was assessed against the lands, not against the interest or estate of the owner or party in possession. Under the provisions of section 6, "all lands shall be assessed in the county" * * * and "lands owned by one person and occupied by another may be assessed in the name of the owner or occupant," and those "not occupied may be assessed as non-resident." The advertisement required under section 50 of the act is notice of sale to pay the amount of taxes "duly assessed against said lands." The interest passed by the deed after tax sale is the fee in the land, and the sale had is to be of "so much of each parcel of land as shall be sufficient to pay the taxes, costs and charges thereon." It is also true that in this statute there is nothing requiring a sale of the personal property before resorting to the land. The tax assessed nnder this statute constituted a lien upon the land. 106 Mass., 30; Cooley on Taxation, 305; Hilliard on Tax., 402; 2 Bay., 248. This lien attached and had relation to the time at which the assesment was made, that date being under this statute the first of March.

This land, in the year 1875, being assessed to its then owner, Miles Price, the defendant, the lien attached on the first of March, A. D. 1875. 45 Mo., 130; 33 N. J., 177. What was the nature of this lien, and to what extent did the subsequent sale of the land by Price to Comfort, and Comfort's relation of mortgagor and owner, and Price's relation of mortgagee as between each other have upon the lien which thus attached?

Of the nature of this lien the Supreme Court of the United States says: "The lien for taxes does not stand upon the footing of an ordinary incumbrance. It attaches to the *res* without regard to individual ownership, and when it is enforced by sale, pursuant to the statute prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title." 93 U. S., 428. Spratt's title, therefore, was absolute, and relieved of any estate of Price or Comfort.

Under our statute any person claiming any of the lands, or any interest therein, may redeem within one year after the sale. In this case there was no redemption. During that period, and before the title was made to Spratt, the tax for 1876 was assessed against the mortgagor and occupant, Comfort. This tax, as the preceding one, was a lien upon the land, because it was assessed according to law against the owner or occupant. Spratt's relation before his title became absolute was that of a party entitled to a lien for his purchase money and interest as prescribed by statute. He had no title, legal or equitable, during the period allowed for redemption. He could not bring trespass. He was not entitled to rents and profits. As between himself and the owner he could not enforce this lien. Under the statute this lien, by non-redemption and the execution of a deed to the purchaser, would develop into a legal title, or upon the expiration of the year without a deed into an

equitable title. The taxable estate during this period remained in the owner or occupant having the right to redeem. Some of the cases sustain the view that had there been another sale for taxes assessed before the period for redemption had expired, the purchaser at the prior sale (Spratt) could have bid at the sale, acquiring all the right remaining in the parties entitled to redeem. 4 Mich., 597; Hilliard on Taxation, 532. The first purchaser would have been under no obligation to pay this second tax. His relation and rights were fixed by the statute, and any interest acquired by a purchaser at a subsequent tax sale during the period when the right to redeem existed, and when the statute gave him a lien with right to a deed after one year, must have been subordinate to this right. In other words, the purchaser at the subsequent sale would have acquired the right to redeem. Tweed vs. Metcalf, 4 Mich., 587; 6 Watts, 512; 33 Penn. State, 94; 26 Ark., 48; 31 Cal., 269; 15 Minn., 245; 55 Penn. State, 188; 1 Doug., (Mich.) 276. What we say in reference to the interest acquired at a second tax sale before the period for redemption under the prior one has expired is not here involved. A reference to this subject is made simply to more clearly define the relation of the purchaser at the first sale to the land.

Spratt, by his deed of June 9, 1877, having acquired an estate divested of any interest of Price or Comfort, the only remaining question is, what was the effect of the second sale, the defendant, the purchaser at such sale, Price, being at the time of the assessment the mortgagee, his mortgagor, Comfort, being the occupant against whom the assessment was made? It is insisted by plaintiff that it was the duty of Price, as mortgagee, to pay this tax, and that his purchase at the tax sale simply operated as a payment. While as between mortgagor and mortgagee such a pur-

chase may enure as a payment under some circumstances, as in a case where he has contracted to pay the tax, or where the mortgagee is in possession, yet "generally a mortgagee not in possession is under no obligation to pay the taxes on the mortgaged property, and there is no reason why he may not acquire title to the property by a fair purchase at a tax sale." Jones on Mortgages, §713.

The position taken by the appellant here is, that it was the duty of Price to pay this tax, and that his purchase under the circumstances operated simply as a payment. If such was his duty, within the meaning of the authorities defining the matter of duty in this connection, the position is well taken.

At the time of the assessment here, Comfort, his mortgagor, was in possession. In contemplation of the revenue law he was the owner in possession, and the assessment was made against him in strict conformity to the statute. The term duty in this connection must be given that signification which the authorities give it. In reference to the payment of taxes the terms duty and obligation are used in two senses, the first being in reference to the sovereign imposing the tax, the second being in reference to individuals. The matter of duty to the sovereign is fixed by the legislative enactment imposing the tax. The matter of obligation to individuals arises from the legal or equitable relation of the parties. In neither case is the measure of the obligation fixed by the mere fact of an interest or estate in the land.

A simple tenant at will, a party with a naked possession, can be the subject of an assessment if such be the statute; and so far as individual obligations are concerned they may arise out of fiduciary relations, and may be so assumed by persons having no interest or estate in the land, not even possession, as to prohibit their becoming a purchaser at a

tax sale. We will examine the cases bearing upon each relation so far as they effect this case.

In the case of Blackwood vs. Van Vliet, 30th Michigan, 121, Judge Cooley for the court says: "To preclude any person from making and relying upon a purchase of lands at tax sale there must be something in the circumstances of the case which impress upon him a duty to the State to pay the tax, or something which renders it inequitable as between himself and the holder of the existing title that he should make the purchase." In his work on Taxation Judge C. on several occasions uses the terms "duty to the government" in this connection, and looking to his work alone we confess we were at a loss to understand precisely what he meant. To the opinion of this eminent jurist great respect is due, whether that opinion be as a Judge or text writer, and it is fortunate that we have a judicial opinion of his in which he interprets this language, thus leaving no doubt as to his view in the premises. We see this language used in the case above cited. In that case he says also: "While a party is not to build up a title on his own neglect of duty, yet if he can show he owes no duty in the premises he is as free to become a purchaser at a tax sale as any other person." He then proceeds to determine what constitutes this "duty to the government," and says: "Where lands are occupied our statutes have always required them to be assessed to the owner or occupant, and where thus assessed it becomes *a duty which the person assessed* owes to the State to make payment. If not occupied the owner owes to the State a like duty. * * * * It may also have been assessed as non-resident, in which case the duty to pay would rest on the owner." * * * *"The obligation to the State was fixed by the assessment."* In his work on Taxation, speaking of the cases announcing the doctrine that mere possession where the tax was assessed

fixes upon the possessor the duty to pay and precluded him from becoming a purchaser at a sale for taxes, after remarking that the reason for such a view is not made very clearly apparent in the decision which he is criticising, he says: "It seems to us that it is deserving of more consideration whether where parties stand to each other in the position of adverse claimants to land either of them can insist that the other shall discharge a *duty to the government* for his protection." Of a purchase by an adverse claimant generally he says: "The State then not being wronged in the purchase it would seem that whatever individual objects to it ought to be able to point out how and in what particular it wrongs him."

The Supreme Court of Pennsylvania announce the general proposition that an individual not standing in any relation of trust, and implicated in no fraud as to the owner of the land, may acquire a title by tax sale, and that his holding a prior defective title will not prevent his purchase. 27 Penn. State, 160, 165.

The Supreme Court of Wisconsin, while declaring in one case (30 Wis., 102,) that a person holding the legal title as trustee cannot purchase certificates of tax sale and claim as against his *cestui que trust* the interest allowed by the statute, it refers in another case with approval to cases holding that such is not the relation between mortgagor and mortgagee, among which cases is that of Harrison vs. Roberts, 6 Fla., 711, and the head note in the last named case in Wisconsin, 20 Wis., 586, states the law to be that "a mortgagee (not in possession) may acquire title as against the mortgagor by purchase under a superior lien either at a tax sale or a sale under a prior judgment."

In the case of Waterson vs. Devoe, 18 Kan., 223, the Supreme Court of Kansas hold that "a mortgagee not in possession of real estate is under no obligation to pay the taxes

on the mortgaged premises," and that "the mere relation of mortgagor and mortgagee will not prevent the person so related from acquiring title to the mortgaged premises by purchase at a tax sale." This was the case of a mortgagee who, prior to his purchase of the tax certificate, had foreclosed his mortgage. This case is well considered and the opinion able. The defendant, Price, in the case at bar had filed his bill to foreclose his mortgage, and had thus assumed an adversary position against his mortgagor when he purchased at tax sale.

The only other cases we find having a bearing upon this subject are cases from Illinois and New York. Of the following cases from Illinois, Judge Cooley, in his work on Taxation, remarks: "The Illinois cases are very emphatic that a mortgagee, like a trustee, cannot affect the rights of the mortgagor by purchasing the property at a sale for delinquent taxes accruing on the premises." After careful examination of these cases we cannot agree with this conclusion. We think that they do not sustain the broad proposition that as between mortgagor and mortgagee the latter cannot acquire a good title through a tax sale. In the case reported in 26 Ill., 507, the court, in discussing the question whether a payment of taxes by the mortgagee shall or shall not enure to the benefit of the mortgage, the question being as to its effect upon the statute of limitations, say: "After a foreclosure, or an effort to foreclose the mortgage by decree or deed, which purports to have that effect, the presumption then arises that all acts done in reference to the property are done under a claim of ownership by the mortgagee." In the latter case reported in 44 Ill., 367, the court say: "The mortgagee in possession would be bound to pay the taxes," and speaking generally of the relation it is said that "we do not say that a mortgagee can in no case buy in an outstanding title and hold it

against the mortgagor without a right of redemption by the latter, but we do say that a mortgagee cannot buy in an outstanding title under an arrangement with the mortgagor, that it is to be held like the mortgage, subject to redemption, and when the title is acquired turn around and insist that he has purchased as a stranger." In this case the purchase of the outstanding title had been made by the mortgagee "with the consent" of the mortgagor, under an agreement that "he was to have further time to redeem."

Of the following case in New York Judge Cooley says: "It is not very clear how far Williams vs. Townsend, 31 New York, 411, was designed to lay down a contrary doctrine," meaning the doctrine of the Illinois cases as understood by him. We cannot coincide with this commentary.

The case was that of a mortgage providing that the mortgagor should pay the taxes and assessments upon the mortgaged premises, and in default of so doing that the mortgagee might discharge the same and collect them as a part of the mortgage. The Court of Appeals decide that the mortgagee might at his option pay the tax or purchase at a tax sale, the court holding that the principle that a person who is placed in a situtation of trust or confidence in reference to the subject matter of a sale, or has a duty to perform which is inconsistent with the character of a purchaser on his own account, does not apply to a tax sale purchase by a mortgagee, saying that the mortgagee "had no duty to perform to the plaintiff" (the mortgagor) "or toward the mortgaged premises that precluded her from buying at the tax sale."

The necessary conclusions we reach in the case are:

First. That Price, by virtue of his relation of mortgagee to this land, the assessment being made against Comfort, the mortgagor and occupant, as required by the statute, owed

no duty to the State which required him to pay the tax. Second. That as to Spratt, in whom the legal title vested by his purchase, Price was a stranger, occupying no fiduciary relation, and entirely competent to purchase his (Spratt's) interest and estate in the land at a tax sale. That every man who claims an estate in the land has a claim or right against every other person making a claim by which his adversary claimant is bound to pay the taxes is not the law. In this view of the case the questions of agency and proof of advertisement are immaterial, and we say nothing of them.

This disposes of the objection of plaintiff to the title of defendant. There is but one other matter requiring attention: when the tax deed of Price was offered in evidence it bore date since issue joined in this case. There was no plea *puis darrien* continuance, and there was an exception for want of "relevancy and pertinency to the issue joined." The general rule in ejectment is unquestionably that any title acquired subsequent to issue joined must be set up by a plea *puis darrien* continuance. 1 Wallace, 374; 7 John., 194; 9 ib., 60; 11 ib., 424; 19 ib., 168; 3 Strob., 504. In this case the purchase of Price was on the third of July, 1877, and he was entitled to a tax deed one year thereafter if there was no redemption. This would have been before issue joined. Under the statute it was the duty of the purchaser to pay and of the Collector to demand and receive the money when the sale was made, and the presumption here is that such payment was made.

It is thus evident, unless the deed related back to the day upon which the party was entitled to it, that there was error in this action of the court. If, however, it did so relate the defence was available under the general issue. 3 Cow., 75. The doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and

is only applied for the security and protection of persons who stand in privity with the person that initiated proceedings for the land, and acquired the equitable claim or right to the title. 9 Wall., 315; 4 John., 230; 12 John., 140. The limitation to its operation is that it shall do no wrong to strangers. 4 John., 234. The person here claiming is the party himself who initiated the proceeding, and there is no injustice to Spratt, as his deed remains intact, and if there is a loss to him it is the result of his own neglect to redeem. After the expiration of the year from the sale Price had an equitable title to the land. Giving effect to the doctrine of relation, in an action of ejectment, so as to perfect a clear equitable title, not antedating by such relation the time of the acquisition of the legal title claimed adversely, but leaving it all the validity which its holder claims for it, cannot be unjust. The holder of the legal title is left where he can recover all he is in equity entitled to. For these reasons we think that the doctrine of relation is applicable, and that the deed was admissible under the general issue.

In ejectment it is required that the plaintiff shall not only have title when the suit is brought, but when it is tried also. 32 Penn. State, 378. That is this case. Here under the operation of the doctrine of relation, admitting for the sake of argument the title of plaintiff at the commencement of the suit, the defendant had the title at the time of trial.

Where, upon a general review of the case, giving the appellant every fair construction of the facts in his favor, an application of the principles of law controlling the matters involved justifies the judgment, it must be affirmed. May's Executors vs. Seymour, 17 Fla., 730; 5 Fla., 268, 465; 6 Fla., 482; 8 Fla., 391. This is that case.

Judgment affirmed.

The preceding opinion was delivered at the January Term, A. D. 1881. The appellant having obtained leave filed the following petition for a rehearing after the adjournment of the term:

The appellant respectfully petitions the court for a rehearing upon the following points:

1. The duty of Price to pay the tax assessed upon the lot in controversy in 1876.

2. The doctrine of relation back applied to Price's deed acquired under a purchase at tax sale for the tax so assessed, making said deed admissible under the general issue.

Judge Cooley, in Connecticut Life Insurance Company vs. Butte, reported in the Central Law Journal January 28, 1881, page 86, refers to the case of Blackwood vs. Van Vliet, 30 Mich., 118, holds that a mortgagee, as well as the mortgagor—there were two mortgagees in this case—owes to the State the duty of paying the tax, and that the tax title the mortgagee acquires, being based in part upon his own default, "simply enures to the protection not the destruction of the regular title."

"It certainly cannot be said," says he, "that the second mortgagee owes any duty to the first mortgagee to protect his lien as against tax sale. Neither on the other hand does the first mortgagee owe any such duty to the second mortgagee, *or to the owner*. To the State each one of the three may be said to owe the duty to pay the taxes, and the State will sell the interest of all if none of the three shall pay. As between themselves the *primary* duty is on the mortgagor; but if he makes default either of the mortgagees may and one of the two must do so, or the land will be sold and his lien extinguished. But in such case where each has the same right, payment by one is allowed to increase the amount of his incumbrance."

"When therefore each mortgagee has the same interest in making payment and the same right to do so, and the same means of compelling repayment, it may well be held that a purchase by one shall not cut off the right of the other, *because it is based as much upon his own default* as that of the party whose lien he seeks to extinguish." Here is a clear unqualified recognition of the *principle* upon which Price's purchase at tax sale operated only as a payment. In the case at bar Price was, by the provisions of his mortgage, authorized expressly to increase the mortgage debt by the amount of taxes which he should be put to pay.

This court in its reasoning conclusively shows that during the period for which the assessment under which Price purchased was made, Spratt had no title, legal or equitable, to this lot; it was subject to be retained in Comfort or Price during this interval by either paying off the incumbrance.

In this case, during the period for which the assessment under which Price purchased was made, the interest of Price in this lot was greater than that of Comfort, as Comfort was insolvent, and the lot, the *only* security Price had for the debt, was not worth the amount of the debt secured by it. The duty which Price *owed* to the State for its protection of this property was greater than the duty which Comfort owed for its protection during this interval, as he (Price) had the greater interest. The duty which Price owed for its protection of this property during this interval is expressed in the tax levied on the lot as his contribution to the expenses incurred by the State in its protection, and was actually using this machinery of the State for the recovery of the lot.

The amount then that Price paid on the so-called tax purchase was simply an expression of the amount which ought to have been contributed by him to the State for

the protection of the rights which he was seeking to enforce.

Now to hold that *this* payment to the State operates to reinvest Price with the title he had previously forfeited to the State, or Spratt claiming under the State, shocks the moral sensibilities again.

The doctrine of relation back is a legal fiction never used to promote injustice. When Spratt began the suit he had no conception that Price had a certificate of tax sale; in fact he had no deed when he tendered the general issue on Spratt's declaration. Spratt's attorneys were not informed that a defence would be made under the general issue on a tax deed acquired after the issue; they had no opportunity of ascertaining, nor do they know now whether the assessment under which Price purchased was regular.

To affirm this case is to put the sanction of this court upon the admission of evidence operating a surprise against which no degree of vigilance, forecast or preparation could guard.

Your petitioner submits that the case decided is one of first impression in the State of Florida, and the decision is erroneous in holding—

First. That a mortgagee who is permitted by law to *redeem from* tax sale the mortgaged lands can by *purchase* at tax sale acquire the mortgaged property.

Second. In affirming the propriety of admitting in evidence a tax deed acquired by defendant *after* issue joined, without a plea of *puis darrien* continuance, under the circumstances of this case.

MR. JUSTICE WESTCOTT delivered the following opinion on the petition for rehearing at the June Term, A. D. 1881:

In the opinion in this case we reviewed all the cases we

could find having a bearing upon the questions involved. The principles announced in the case of the Connecticut Mutual Life Insurance Company vs. Butte, decided by the Supreme Court of Michigan at January Term, A. D. 1881, of that court, which case was not then before us, it is insisted discloses the error of our conclusions in this case. We examine that case. It was an action of ejectment by a first mortgagee against a second mortgagee claiming under a tax title acquired by second mortgagee's agent after foreclosure and sale under the second mortgage, the first mortgage having subsequently foreclosed and purchased the property. The court assimilate the case to that of one tenant in common purchasing at a tax sale the interest of his co-tenant, and remark that "it is no doubt true that a second mortgagee is under no obligation to protect the first mortgagee, and that the real point in controversy is whether, if the second mortgagee pay the taxes or bid off the land, the payment or purchase will not *ipso facto* constitute a protection," and the decision is that when the second mortgagee (the party purchasing in that case,) is in a position to add the amount of the purchase to the amount of his mortgage lien, and the first mortgagee assents thereto, then the purchase should be treated as a payment only, that the first mortgagee could not recover in ejectment without a tender of repayment of the tax, and that such tender involved the admission that the second mortgage was a living unextinguished lien. The court say, however, that if this second mortgage is destroyed by the subsequent foreclosure proceeding of the first mortgagee there was no equity entitling the first mortgagee to insist that the purchase was a payment, and the tax deed would be sustained, and that if the first mortgagee denied the existence of the second mortgage, there was nothing to preclude the second mortgagee from insisting that he held the tax title

as any mere stranger to the title. We have stated the case very fully in order that the great difference between it and the case at bar may be seen. When Price here purchased at the tax sale, he was, so far as Spratt was concerned, a stranger to the title. He was not a mortgagee as to Spratt, for Spratt's claim is that he held then the title discharged of Price's mortgage lien. If Spratt got any title it was free from this lien, as he was a stranger to the title to Price, the mortgagee, and to Comfort the mortgagor. Spratt does not here propose to tender Price the money he has paid, nor does he admit that Price's mortgage is now a subsisting lien. Spratt himself was no mortgagee, either first or second. He purchased at a tax sale, which he contends destroyed any mortgage lien, and it certainly would be very strange indeed if he can claim that Price was a mortagee whenever it operated for his, Spratt's, benefit, but not a mortgagee when it is to result in his, Spratt's injury. It is true that in this case in Michigan, Judge Cooley, speaking of the relations of first and second mortgagees and mortgagor to the State, remarks that "each one of the three may be said to owe the duty to pay the taxes, and the State will sell the interest of all if none of the three shall pay." As applicable to that case, such a general remark may or may not be the subject of adverse criticism. It may be within the line of thought which its peculiar circumstances inspired, but it is not, and cannot be, applicable to this case, so different in its facts that the peculiar equities announced in the Michigan case cannot be operative. Again, this language, if given the signification which appellant contends for, is certainly in conflict with the ideas of "duty to the State," as announced by the same court in the case of Blackwood vs. Van Vleit, 30 Mich., 123, where the particular matter was the subject of its consideration.

We had occasion in the case of Gorton vs. Paine, decided at last term, to consider the relation of a second mortgagee purchasing a tax title after foreclosure of his mortgage to he firs mortgagee, and we refer to that case for our views upon the subject. As to the relation of a mortgagee out of possession, under no contract to pay the taxes to the State and to the mortgagor in possession, from which it is sought here to make Price, by his purchase at a tax sale, pay a tax due upon the then property of Spratt, we will repeat that he owed no obligation to the State or to his mortgagor to pay the taxes upon the land. He was, or should have been, taxed upon the security which he held. Lamar vs. Palmer, Collector of Revenue, 18 Fla. To pay this is the extent of his legal duty. The mortgaged land may be valued at ten thousand dollars, and the mortgage be for five hundred. The tax against the mortgage is for the latter sum. This is the extent of his interest. True it may be that a sale for the tax levied against the land of the mortgagor would destroy this security of the mortgagee, and it is on account of this resulting loss that some of the courts hold that he may pay the tax before sale, and the statute gives him a right to redeem after sale, and not because of and "*duty*" that he owes either to the State or to the mortgagor which requires him to pay a tax due by a person other than himself. As to the matter of relation of the deed to the day the party was entitled to it, we can only repeat what we have said in the opinion. From the day he was entitled to the deed he had the equitable title. His purchase was at public sale and the facts which constituted the basis of the action of the court were matters readily ascertainable by the appellant.

The rehearing is denied.

EDWARD J. MURPHY, APPELLANT, VS. THE CITY OF JACKSONVILLE, APPELLEE.

1. Municipal councils of cities and towns in this State are prohibited by law from levying taxes for other than the purposes of their own government. They have no power to lay taxes to pay the expenses of detecting and prosecuting persons charged with murder and arson.
2. The Mayor and Council of a city or town cannot create an indebtedness to be paid by taxation by offering a reward for the apprehension and conviction of criminals punishable under the laws of this State.
3. A demurrer to a plea, however bad the plea may be, reaches back to the declaration, and if that be bad the judgment overruling the demurrer must be sustained.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

C. P. Cooper and *M. C. Jordan* for Appellant.

John Earle Hartridge for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Murphy brought suit against the City of Jacksonville to recover the amount of a reward offered by the Mayor, under a resolution of the council of the city, "for the arrest and conviction of the person or persons who set fire to the store and murdered Jacob J. Syples on the night of October 11, 1878." Plaintiff alleges that he, confiding in the condition of said offer, arrested two persons for the commission of said crimes, and on the first of May, 1879, furnished evidence against one of them by reason whereof he was convicted of the said murder and sentenced to punishment by the judgment of the Circuit Court, wherefore the said city became indebted to him, &c.

The defendant pleaded that the city in the exercise of

its discretion as a *quasi* sovereignty adjudicated the claim of plaintiff and refused to pay the plaintiff, but determined that one Hoey was entitled to the reward and paid it to him.

Plaintiff demurred to this plea but the demurrer was overruled and final judgment rendered against plaintiff, from which he appeals.

Many English and American cases are cited to show that cities, like individuals, in virtue of their general police power, may become liable to pay rewards offered by the municipal authorities for the detection and punishment of certain crimes committed within their borders. This doctrine is concisely stated in 1 Dillon on Municipal Corporations, §91. He states further, §356, that a municipal corporation may at common law enjoy the franchises of holding a court, and municipal courts, which were local or of inferior jurisdiction, were not uncommon.

Whether the liability of the city to pay rewards for the detection and punishment of crimes other than those committed against the municipal ordinances exists, depends in this State upon the character and powers of our municipal governments under the Constitution and acts of the Legislature. This is readily determined by reference to their provisions.

Section 16 of article VI. of the Constitution authorizes the Legislature to "establish courts for municipal purposes only in incorporated cities and towns." Section 6 of Article XII. provides that "the Legislature shall authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes, and for *no other purpose.*"

The act to provide for the incorporation of cities and towns (Chap. 1688, Laws of 1869), shows what powers have been granted by the Legislature. Section 11 declares "that

the City or Town Council shall have the power to pass all such ordinances and laws as may be expedient and necessary for the preservation of the public peace and morals, for the suppression of riots and disorderly assemblies and for the good order and government of the city or town, and to impose such pains, penalites and forfeitures as may be needed to carry the same into effect," provided such ordinances are not inconsistent with the laws of the State.

Section 23 provides "that the City or Town Council shall have power to raise by tax and assessment upon all real and personal estate, and by any other constitutional method of taxation within the corporation, any and all sums of money that may be required for the use and good government of the city or town and for carrying out the powers, rights and duties herein granted and imposed."

It is thus shown that the municipal courts are established "for municipal purposes only." Jurisdiction to arrest and try persons charged with offences under the general laws of the State is reserved to the courts established for such purposes, and such jurisdiction is prohibited to the Mayor's courts of cities and towns. The Council has power to pass such ordinances as will enable the Mayor and police to preserve the peace and insure the good order and government of the city. It has also power to regulate, improve, alter, extend and open streets, to prevent encroachments thereon, to suppress disorderly places and practices, &c., and enforce reasonable ordinances passed in furtherance of the general purposes of its existence, and to publish violations of such ordinances.

In the language of Judge Dillon, "it may, however, be observed that the power to make by-laws is limited, and does not extend to acts criminal in their nature, and which are punishable by criminal statutes in force throughout the municipality." Mun. Corp., §356.

The crimes of murder and arson are punishable by the process and proceedings of the courts of the State and not by the municipal courts.

Taxes are levied by the Legislative power of the State to pay for detecting and punishing crimes of that grade, and municipal governments are, of course, prohibited to levy taxes for such purposes. The City Council can levy taxes according to the exact terms of the Constitution and statutes for municipal purposes only.

The natural and very obvious result of these provisions is, that because taxes cannot be levied by the City Council to pay the expenses of detecting and bringing to justice persons guilty of crimes punishable under the general laws, the Mayor and Council cannot create an indebtedness against the corporation for any such purpose, whether by proclamation, resolution or ordinance. And this plainly results in the utter invalidity of the promise of reward for the arrest, obtaining evidence and other proceedings mentioned in the plaintiff's declaration. These are expenses to be borne by the State and cannot lawfully be paid by the city.

We cannot consider the plea in this case, for whether good or bad the plaintiff's demurrer to it involves the question whether the declaration shows a substantial cause of action. Wade vs. Doyle, 17 Fla., 522; Sanford vs. Cloud, ib., 532.

The detection of crimes of great magnitude and the discovery of evidence for the conviction of such offenders, are very frequently the work of skilful policemen and detectives who deserve ample reward, but under our laws they must look to the beneficence of the Legislature for compensation. Where no such provision is made by law, or is refused by the Legislature, the incentive to skilful exertions

on the part of policemen and detectives is small indeed. But we must deal with the law as we find it.

In the elaborate brief of counsel for appellant reference is made to cases where suits have been maintained to recover money promised by the Mayor and Common Council of Boston and other cities by way of reward offered for the detection and conviction of criminals, but those cities are invested with ample powers of government, with courts having jurisdiction to punish all classes of offenders, and are liable to pay the necessary expenses of such proceedings. Our cities have no such courts and no such powers, in fact no discretion whatever as to the paying other than certain well defined classes of expenses.

The judgment is affirmed.

THOMAS EMMET WILSON, APPELLANT, VS. M. R. MARKS, APPELLEE.

1. It is not error to refuse to strike out a special plea upon the alleged ground that the matters therein stated are not responsive to the allegations of the declaration and do not constitute a defence. The plaintiff should demur.

2. In an action for libellous publication charging that plaintiff had committed perjury in a matter of "a final homestead proof," defendant by a special plea of justification alleges that plaintiff committed perjury in a certain affidavit made for the purpose of proving a right of homestead entry in behalf of one P., and afterwards filed a further special plea alleging perjury by plaintiff in another similar affidavit made in behalf of himself, a "new assignment" by plaintiff to the effect that the defendant in the libellous publication charged the perjury to have been committed in the former affidavit and not in the latter, is not an appropriate pleading. A "new assignment" is proper only where there were two causes of action and the declaration is so general as apparently to cover both,

and the plea sets up a defence to one; the new assignment being in aid of the declaration to designate which of the two several causes of action was intended to be declared on.

3. Under a declaration for libel damages being generally and not specially alleged, evidence of special damage is not admissible.
4. A charge of the court not excepted to cannot be assigned as error.
5. A charge to the jury "that the publication of the truth is not a libel," is not correct; it may be libellous and actionable to publish the truth, unless the publication is prompted by "good motives."
6. Where a right of action is clearly made out by proper proofs, and there is no conflicting or opposing evidence, a verdict of no cause of action should be set aside as being contrary to law and the evidence.

Appeal from the Circuit Court for Orange county.

Section 9 of the Bill of Rights is as follows: "Every citizen may fully speak and write his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or the press. In all criminal prosecutions and civil actions for libel the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libellous is true, but was published for good motives, the party shall be acquitted or exonerated."

The other facts are stated in the opinion.

Thomas E. Wilson, in pro per.

THE CHIEF-JUSTICE delivered the opinion of the court.

Wilson sued Marks for publishing a libel charging him with having committed perjury. The defendant pleaded not guilty and also a special plea (called a third plea) averring that the charge in the publication made by him against the plaintiff is true, allegeing that a certain affidavit made by plaintiff in proof of a homestead entry by one P. was false, and that plaintiff therein committed wilful and cor-

EDWARD J. MURPHY, APPELLANT, VS. THE CITY OF JACKSONVILLE, APPELLEE.

1. Municipal councils of cities and towns in this State are prohibited by law from levying taxes for other than the purposes of their own government. They have no power to lay taxes to pay the expenses of detecting and prosecuting persons charged with murder and arson.
2. The Mayor and Council of a city or town cannot create an indebtedness to be paid by taxation by offering a reward for the apprehension and conviction of criminals punishable under the laws of this State.
3. A demurrer to a plea, however bad the plea may be, reaches back to the declaration, and if that be bad the judgment overruling the demurrer must be sustained.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

C. P. Cooper and *M. C. Jordan* for Appellant.

John Earle Hartridge for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Murphy brought suit against the City of Jacksonville to recover the amount of a reward offered by the Mayor, under a resolution of the council of the city, "for the arrest and conviction of the person or persons who set fire to the store and murdered Jacob J. Syples on the night of October 11, 1878." Plaintiff alleges that he, confiding in the condition of said offer, arrested two persons for the commission of said crimes, and on the first of May, 1879, furnished evidence against one of them by reason whereof he was convicted of the said murder and sentenced to punishment by the judgment of the Circuit Court, wherefore the said city became indebted to him, &c.

The defendant pleaded that the city in the exercise of

I. The first error assigned is, that the court refused plaintiff's motion to strike off the plea last filed. The defendant obtained leave to file this plea upon the ground that he had just discovered the evidence of the truth of it. This plea says that the publication of the alleged libellous matter was justifiable because of the perjury set forth in the said last plea, and that the charge was true. The ground of the motion was, that if defendant, as he had stated in his affidavit upon which he obtained leave to file the plea, had just discovered the evidence of the fact pleaded, such evidence could not have been the ground of his published charge of perjury, and that therefore the fact pleaded was not the basis of the published charge. But the defendant's affidavit did not state that he did not know at the time of his publication of the particular fact of perjury which he desired to plead, but that he had just discovered the *evidence* of the perjury he had charged, therefore there was no error in refusing to strike it off.

The plaintiff did not reply generally to this additional plea, but replied specially by what he denominates a "new assignment," which is in effect a special replication to the plea. The matter of the said special replication was that the libellous publication mentioned in the declaration charged the plaintiff with having committed perjury in "making proof of a final homestead proof," and that the charge in the libel referred to the making oath by the plaintiff relating to the homestead proof for and in behalf of one Hiram Potter, and that the said libel did not refer to and the declaration did not allege that defendant had charged the plaintiff with the perjury alleged against plaintiff in the last mentioned plea.

The defendant demurred to this "new assignment" or replication, and the court overruled the demurrer. Here the pleading stops.

the City or Town Council shall have the power to pass all such ordinances and laws as may be expedient and necessary for the preservation of the public peace and morals, for the suppression of riots and disorderly assemblies and for the good order and government of the city or town, and to impose such pains, penalites and forfeitures as may be needed to carry the same into effect," provided such ordinances are not inconsistent with the laws of the State.

Section 23 provides "that the City or Town Council shall have power to raise by tax and assessment upon all real and personal estate, and by any other constitutional method of taxation within the corporation, any and all sums of money that may be required for the use and good government of the city or town and for carrying out the powers, rights and duties herein granted and imposed."

It is thus shown that the municipal courts are established "for municipal purposes only." Jurisdiction to arrest and try persons charged with offences under the general laws of the State is reserved to the courts established for such purposes, and such jurisdiction is prohibited to the Mayor's courts of cities and towns. The Council has power to pass such ordinances as will enable the Mayor and police to preserve the peace and insure the good order and government of the city. It has also power to regulate, improve, alter, extend and open streets, to prevent encroachments thereon, to suppress disorderly places and practices, &c., and enforce reasonable ordinances passed in furtherance of the general purposes of its existence, and to publish violations of such ordinances.

In the language of Judge Dillon, "it may, however, be observed that the power to make by-laws is limited, and does not extend to acts criminal in their nature, and which are punishable by criminal statutes in force throughout the municipality." Mun. Corp., §356.

The crimes of murder and arson are punishable by the process and proceedings of the courts of the State and not by the municipal courts.

Taxes are levied by the Legislative power of the State to pay for detecting and punishing crimes of that grade, and municipal governments are, of course, prohibited to levy taxes for such purposes. The City Council can levy taxes according to the exact terms of the Constitution and statutes for municipal purposes only.

The natural and very obvious result of these provisions is, that because taxes cannot be levied by the City Council to pay the expenses of detecting and bringing to justice persons guilty of crimes punishable under the general laws, the Mayor and Council cannot create an indebtedness against the corporation for any such purpose, whether by proclamation, resolution or ordinance. And this plainly results in the utter invalidity of the promise of reward for the arrest, obtaining evidence and other proceedings mentioned in the plaintiff's declaration. These are expenses to be borne by the State and cannot lawfully be paid by the city.

We cannot consider the plea in this case, for whether good or bad the plaintiff's demurrer to it involves the question whether the declaration shows a substantial cause of action. Wade vs. Doyle, 17 Fla., 522; Sanford vs. Cloud, ib., 532.

The detection of crimes of great magnitude and the discovery of evidence for the conviction of such offenders, are very frequently the work of skilful policemen and detectives who deserve ample reward, but under our laws they must look to the beneficence of the Legislature for compensation. Where no such provision is made by law, or is refused by the Legislature, the incentive to skilful exertions

on the part of policemen and detectives is small indeed. But we must deal with the law as we find it.

In the elaborate brief of counsel for appellant reference is made to cases where suits have been maintained to recover money promised by the Mayor and Common Council of Boston and other cities by way of reward offered for the detection and conviction of criminals, but those cities are invested with ample powers of government, with courts having jurisdiction to punish all classes of offenders, and are liable to pay the necessary expenses of such proceedings. Our cities have no such courts and no such powers, in fact no discretion whatever as to the paying other than certain well defined classes of expenses.

The judgment is affirmed.

THOMAS EMMET WILSON, APPELLANT, VS. M. R. MARKS, APPELLEE.

1. It is not error to refuse to strike out a special plea upon the alleged ground that the matters therein stated are not responsive to the allegations of the declaration and do not constitute a defence. The plaintiff should demur.

2. In an action for libellous publication charging that plaintiff had committed perjury in a matter of "a final homestead proof," defendant by a special plea of justification alleges that plaintiff committed perjury in a certain affidavit made for the purpose of proving a right of homestead entry in behalf of one P., and afterwards filed a further special plea alleging perjury by plaintiff in another similar affidavit made in behalf of himself, a "new assignment" by plaintiff to the effect that the defendant in the libellous publication charged the perjury to have been committed in the former affidavit and not in the latter, is not an appropriate pleading. A "new assignment" is proper only where there were two causes of action and the declaration is so general as apparently to cover both,

and the plea sets up a defence to one; the new assignment being in aid of the declaration to designate which of the two several causes of action was intended to be declared on.

3. Under a declaration for libel damages being generally and not specially alleged, evidence of special damage is not admissible.
4. A charge of the court not excepted to cannot be assigned as error.
5. A charge to the jury "that the publication of the truth is not a libel," is not correct; it may be libellous and actionable to publish the truth, unless the publication is prompted by "good motives."
6. Where a right of action is clearly made out by proper proofs, and there is no conflicting or opposing evidence, a verdict of no cause of action should be set aside as being contrary to law and the evidence.

Appeal from the Circuit Court for Orange county.

Section 9 of the Bill of Rights is as follows: "Every citizen may fully speak and write his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or the press. In all criminal prosecutions and civil actions for libel the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libellous is true, but was published for good motives, the party shall be acquitted or exonerated."

The other facts are stated in the opinion.

Thomas E. Wilson, in pro per.

THE CHIEF-JUSTICE delivered the opinion of the court.

Wilson sued Marks for publishing a libel charging him with having committed perjury. The defendant pleaded not guilty and also a special plea (called a third plea) averring that the charge in the publication made by him against the plaintiff is true, allegeing that a certain affidavit made by plaintiff in proof of a homestead entry by one P. was false, and that plaintiff therein committed wilful and cor-

rupt perjury, wherefore the alleged publication was made by him. There was a replication to this plea. Afterward another plea was filed by defendant avering that plaintiff committed perjury in a certain other affidavit relating to his own entry of a homestead, and the alleged libellous publication was true and wherefore he published the same. A motion by plaintiff to strike off this plea upon grounds hereafter stated was denied. The plaintiff thereupon filed a paper called a "new assignment" to the effect that the libellous publication was not made, and the perjury therein alleged was not charged with respect to the affidavit and oath mentioned in the last plea, but with reference to the affidavit mentioned in the said third plea. Defendant demurred to this "new assignment," and the demurrer was overruled by the court, thereby sustaining the new assignment. No other pleading was had thereon.

The publication of the alleged libellous article was shown and the same was read to the jury.

Several witnesses testified to the good character and standing of the plaintiff. Question was asked by John W. Price, a witness, by plaintiff's counsel, "What damage has Mr. Wilson sustained by this libel published in this suit?" This question was objected to and the objection sustained.

No testimony was offered by defendant, and the cause was submitted to the jury under the charge of the court. The Judge charged that an accusation of perjury is actionable in itself. Other instructions were given at the request of the respective parties, and no exceptions were taken thereto. The jury found a verdict for defendant. A motion for a new trial was made by plaintiff on the grounds that the verdict was contrary to the law, to the evidence and to the charge of the court, which motion was denied and judgment entered against the plaintiff, who appealed.

I. The first error assigned is, that the court refused plaintiff's motion to strike off the plea last filed. The defendant obtained leave to file this plea upon the ground that he had just discovered the evidence of the truth of it. This plea says that the publication of the alleged libellous matter was justifiable because of the perjury set forth in the said last plea, and that the charge was true. The ground of the motion was, that if defendant, as he had stated in his affidavit upon which he obtained leave to file the plea, had just discovered the evidence of the fact pleaded, such evidence could not have been the ground of his published charge of perjury, and that therefore the fact pleaded was not the basis of the published charge. But the defendant's affidavit did not state that he did not know at the time of his publication of the particular fact of perjury which he desired to plead, but that he had just discovered the *evidence* of the perjury he had charged, therefore there was no error in refusing to strike it off.

The plaintiff did not reply generally to this additional plea, but replied specially by what he denominates a "new assignment," which is in effect a special replication to the plea. The matter of the said special replication was that the libellous publication mentioned in the declaration charged the plaintiff with having committed perjury in "making proof of a final homestead proof," and that the charge in the libel referred to the making oath by the plaintiff relating to the homestead proof for and in behalf of one Hiram Potter, and that the said libel did not refer to and the declaration did not allege that defendant had charged the plaintiff with the perjury alleged against plaintiff in the last mentioned plea.

The defendant demurred to this "new assignment" or replication, and the court overruled the demurrer. Here the pleading stops.

Whether it was error to proceed to trial with the pleadings in this condition, and whether the plaintiff can allege this for error, it is not here necessary to determine. The pleading by a "new assignment" in this case was illegitimate.

"A new assignment is in general necessary, where the plaintiff has or has had *two* causes of action against the defendant, either of which the declaration will fit, and the defendant having a supposed answer to *one* such cause of action, pleads that answer." 2 Chitty on Pleading, 16 Am. Ed., 439, and cases cited; 2 Addison on Torts, Dudley & Baylie's Ed., 1167.

The substance of the last plea, it is claimed by the plaintiff, is a charge of perjury which defendant offers to prove in justification, but not the charge of perjury mentioned in the declaration and upon which this suit was brought. In other words, he claims that the defendant offers under the last plea to prove that the plaintiff committed perjury in a matter other than that charged in the alleged libel. That seems also to have been the view of the Judge in overruling the demurrer.

If the plea referred to is not responsive to the declaration, and does not set out matter of legitimate defence of the libellous publication, the proper course would seem to be to demur to it or to object to testimony under it upon the trial. The case is not one in which a pleading by a "new assignment" is proper. We have found no case in the books where a "new assignment" has been made in actions other than on contract, trespass or trover.

II. As to the second error assigned, that the court erred in overruling the question put to the witness, Price, "What damage has plaintiff sustained by this libel?" it is clear that the ruling was correct. The declaration was general in its allegation of damage, no special damage being

alleged. Special damage in actions for slander or libel must be alleged in order to lay the foundation for such proof. The question propounded to the witness tends to deduce testimony as to some specific damage, and as there is no allegation of special damage, the testimony was properly rejected. Backus vs. Richardson, 5 John., 476; Tobias vs. Harland, 4 Wend., 537; Crafts vs. Bolte, 1 Saund., 243, c. n. 5.

III. The third ground of error is, that the instructions to the jury prayed for by defendant and given by the court are erroneous.

While the propositions contained in these instructions are somewhat confused, and may have been misunderstood by the jury, yet no exceptions were taken to either of them, and the plaintiff cannot therefore insist upon any such error to reverse the judgment. It may be suggested, however, that the first of the two propositions of the instructions is not applicable to the case, as there are no special damages alleged in the declaration. The second proposition, "that the publication of the truth is not a libel," must be qualified by the last period of section 9, Declaration of Rights, Constitution of Florida, that the publication of the truth was prompted by "good motives."

IV. The last assignment is, that the court erred in refusing a new trial. The plaintiff moved that the verdict be set aside and a new trial be granted upon the ground that the verdict was contrary to law, contrary to the evidence and to the charge of the court.

This error is well assigned. The declaration alleges a gross libel, the charge of an infamous offence published by the defendant against the plaintiff. The declaration is fully sustained by the testimony, and there is no conflict of proof. There was no testimony offered by the defendant to sustain the plea of justification. The law declares such a publica-

tion to be libellous and gives a right of action to the plaintiff against a defendant who is responsible for the publication. The Judge charged the jury that such a libellous publication was actionable, and yet in the face of this state of things the jury found a verdict for the defendant.

This verdict was found upon something not apparent in the record. It is contrary to law, contrary to the evidence and contrary to the charge given them by the court.

The judgment is reversed, with costs, and a new trial must be granted.

JEREMIAH M. HOWER, JR., APPELLANT, VS. GEORGE W. LEWTON, APPELLEE.

1. On sustaining a demurrer to a declaration upon the ground that the facts stated were insufficient to maintain the action, there being no question of jurisdiction, it is error to dismiss the suit for want of a declaration. The final judgment should have been upon the demurrer, the plaintiff failing to amend.
2. In an action for malicious prosecution by causing plaintiff to be arrested upon a criminal charge, the failure of the grand jury to find an indictment and the discharge of the accused by the court, constitute such a termination of the proceedings as is necessary to sustain the action.

Appeal from the Circuit Court for Orange county.

The declaration is as follows:

Jeremiah H. Hower, Jr., by his attorneys, E. K. Foster and St. Clair Abrams & Summerlin, sues George W. Lewton, of Orange county, State of Florida, for that the defendant falsely and maliciously, and without reasonable or probable cause, appeared in July, 1879, before one J. C. Philips, Esq., a United States Commissioner, and charged the plaintiff with perjury, and upon such charge procured the said

United States Commissioner to grant his warrant for apprehending the plaintiff and bringing him before the said United States Commissioner to be dealt with according to law, and by virtue of said warrant caused the plaintiff to be arrested and afterwards to be conveyed in custody before the said United States Commissioner, and procured the said United States Commissioner to remand the plaintiff to the custody of the Marshal, and to avoid going into confinement said plaintiff had to give bond for his appearance from time to time before said United States Commissioner pending said examination, when the defendant caused the said United States Commissioner to commit the plaintiff for trial and to prison. The said United States Commissioner making the following order: "It is, therefore, ordered that the defendant, Jeremiah M. Hower, Jr., be held in the sum of one thousand dollars bail, and that the same shall be secured by two or more good and sufficient sureties, to be and appear before the United States District Court on the first Monday in December, A. D. 1879, to await the action of the grand jury thereof upon said charge, and that in default of bail, said defendant, Jeremiah M. Hower, Jr., shall stand committed to the common jail of said District until such bail be found, or he be discharged by due course of law." That said order was made on the 13th day of September, A. D. 1879; that in obedience to said order the plaintiff appeared at the session of the United States Court on the first Monday of December, A. D. 1879, and remained in said attendance until the grand jury were discharged, and no indictment being brought against him, the Judge of the United States Court did order and adjudge that he be discharged and his bondsmen released, and the said prosecution was so ended and the plaintiff was discharged from custody, whereby the plaintiff has been injured in his credit and reputation, and has

suffered in mind and body, and has been prevented from attending to his business, and has incurred expenses in defending himself and obtaining his release from custody. Whereby the plaintiff claims damages against the defendant, George W. Lewton, to the amount of ten thousand dollars, for the recovery of which he brings this his suit.

The other facts are stated in the opinion.

E. K. Foster for Appellant.

The declaration was a good one and does set up sufficient to maintain a cause of action for malicious prosecution. The declaration varies but little in form from one in 2 Chitty's Pleadings, 16th Edition, page 555. The action for malicious prosecution will lie when there has been such a termination as would require another prosecution to be commenced to convict the party other than the one upon which he was first arrested. Where one causes the arrest of another for perjury or any other felony, and fails to prove his case, or takes no further part in pursuing the charge, and the prosecution for any cause terminates without conviction, unless the termination is procured by collusion on the part of the defendant and the prosecuting officer, the action of malicious prosecution will lie against the party who caused the prosecution to be commenced. If the party arrested proves that his arrest was caused by the defendant in the action falsely, maliciously and without reasonable or probable cause, it is not necessary that there should be an acquittal to maintain the action. 36 Conn., Brown, vs. Randall; Clark vs. Cleveland, 6 Hill, 345; Rice vs. Ponder, 7 Ind., 390; Stancliff vs. Parmeter, 18 Ind., 321; Leever vs. Hummell, 57 Ind., 423; Moulton vs. Beecher, 15 N. Y., 100; Hays vs. Blizzard, 30 Ind., 457; Drigs vs. Burton, 44 Vt., 125.

The second ground for error is, that cause should not stand dismissed for want of a declaration.

The judgment should have been for the defendant upon demurrer, with his costs.

John W. Price for Appellee.

There are two classes of cases in which relief may be had and damages recovered for malicious prosecution, viz:

First. Where a party has been arrested by a Justice of the Peace, or other like officer, without reasonably legal grounds, is thereafter discharged without further proceedings, for the want of sufficient evidence, by the same officer who issued the warrant. That is described as an illegal arrest.

Second. Where a party has been arrested, carried before and examined by a Justice of the Peace or other examining officer, and after a preliminary examination is bound over to the court who has jurisdiction to try the crime with which he is charged to answer to and for such an offence. Wherein the grand jury refuse or fail to find a true bill on the evidence produced to them, presumably the same that was used before the examining court, or that the grand jury indict such party, and upon his trial is acquitted for the want of evidence.

The first of these cases is not applicable to the case at bar, as shown by the declaration filed.

The declaration in this case shows that plaintiff was arrested on a warrant procured to be issued on the affidavit of the defendant by a United States Commissioner, who after hearing the evidence bound the now plaintiff to appear before the United States Circuit Court. The grand jury did not find a "true bill," or take any other notice of the case, never having been brought before them. The Judge of that court, as appears from the declaration, with-

out having anything before him on which he acted discharged the plaintiff, and relieved, as far as he could, his bondsmen without making any records thereof.

The declaration does not allege that the plaintiff's case was ever examined into by the grand jury and the bill ignored, or that they refused to find a "true bill," or that he was indicted and acquitted for the want of evidence to convict. Not showing that there was any legal or final disposition of the charge whatever.

The pleading does not show that the plaintiff may not at any term of the United States Court be indicted, tried and convicted for the crime charged, and for which he is now trying to recover damages for being maliciously prosecuted.

To maintain an action for malicious prosecution the declaration must show, and proof establish the fact, that the plaintiff has been legally acquitted and discharged, if not the declaration is insufficient in law, and the necessary proof cannot be introduced thereunder to sustain the action. The declaration is not sufficient in law to call upon the defendant to plead in any manner.

Therefore the demurrer filed to the declaration should be sustained and the cause dismissed, unless an amended dec laration is filed alleging the necessary facts. Fisher vs. Bristow, 1 Doug., 215; Cardival vs. Smith, 109 Mass. R., 158; O'Brien vs. Barry, 106 Mass. R., 300. And it is a part of the plaintiff's case to show that the prosecution has terminated. Same authorities.

THE CHIEF-JUSTICE delivered the opinion of the court.

Appellant sued Lewton for falsely, maliciously and with out probable cause, causing him to be arrested and held to bail upon a criminal charge, that he was thereby compelled to give bail to attend court to answer to an indictment, and

did so attend at great inconvenience and expense, &c., and that no indictment was found against him, and the Judge of the court therefore discharged him from said arrest and custody, wherefore he claims damages.

The defendant (appellee) demurred to the declaration upon the ground that the declaration did not state a cause of action, and was insufficient in law to maintain this action.

The court sustained the demurrer, and on the same day gave judgment that "the cause be dismissed for want of declaration." Plaintiff appealed, and assigns for error (1) that the court sustained the demurrer, and (2) in dismissing the cause for want of a declaration.

There was clearly error in dismissing the suit for want of a declaration. There was no question of the jurisdiction of the court. If the defendant was entitled to any judgment it was a final judgment upon the ruling of the court sustaining the demurrer (the plaintiff not amending), and not a judgment of dismissal for want of a declaration, because there was a declaration on file and of record. For this cause the judgment must be reversed.

The parties have submitted the whole case, as well npon the demurrer and the ruling of the court thereon, as upon the judgment of dismissal.

"An action on the case for a malicious prosecution may be founded upon an indictment whereon no acquittal can be had, as if it is rejected by the grand jury, or be *coram non judice,* or be insufficiently drawn." 3 Bl. Comm., 127.

To maintain this action the plaintiff must show that he has been prosecuted by the defendant criminally or in a civil suit; that the prosecution is at an end; that it was instituted maliciously and without probable cause, and that he has thereby sustained damage. It is not necessary that the whole proceedings be utterly groundless, for if ground-

less charges are maliciously and without probable cause coupled with others which are well founded, they are not on that account the less injurious, and therefore constitute a valid cause of action. 2 Greenleaf Ev., 8th Ed., §449.

It must appear that the prosecution is at an end. If the party has been arrested and bound over on a criminal charge, but the grand jury did not find a bill against him, proof of this fact and that he has been discharged by the court is sufficient. 2 Greenl. Ev., §452, and authorities 18 Ind., 321; 30 Ind., 457; 44 Vt., 125; 36 Conn., 56; 6 Gray, 498, &c.

In O'Brien vs. Barry, 106 Mass., cited by defendant's counsel, the court held simply that the action for malicious prosecution could not be maintained while such prosecution (a replevin suit) was pending before the court. Cardival vs. Smith, 109 Mass., 158, also cited by defendant's counsel, gives this as the law in criminal cases: if the accused, after being arrested, is discharged by the grand jury finding no indictment, that shows a legal end to the prosecution; citing numerous English and American decisions.

The failure of the grand jury to find an indictment against the plaintiff, and the discharge of the accused by the Judge from custody and his sureties from their obligation upon the bail-bond, was an end to the prosecution complained of. The declaration was sufficient to maintain the action, and the demurrer should be overruled with leave to the defendant to plead.

The judgment of the Circuit Court is reversed, and the judgment of that court sustaining the demurrer must be set aside and judgment entered overruling the demurrer, with leave to defendant to plead over.

WILLIAM SEDGWICK, PLAINTIFF AND APPELLANT, VS. DE-WITT C. DAWKINS, DEFENDANT AND RESPONDENT.

1. After final judgment in proceedings commenced under the common law practice anterior to the code, an appeal prosecuted after the passage of the code is controlled by the provisions of the code.
2. The code does not require a bond in an appeal. It requires an undertaking. Such undertaking need not be approved by the Judge or Clerk.
3. Where the final judgment is a judgment for defendant upon his motion to arrest a judgment upon a verdict of the plaintiff, the error, if there be one, is an error apparent in the record, and no exception, or bill of exceptions, or case is necessary to the review of the action of the court.
4. A judgment "that the plaintiff take nothing by his declaration in this cause, and that defendant do have and recover of the plaintiff his costs now taxed at —— dollars and —— cents," is a final disposition of the subject-matter of the litigation, and an appeal lies from such judgment to this court.
5. Motions in arrest of judgment arise from *intrinsic* causes appearing upon the face of the record, and must be founded upon such matter as would, upon demurrer, have been sufficient to overthrow the action or plea.

Appeal from the Circuit Court for Duval county.

The respondent moved to dismiss the appeal on the grounds stated in the opinion of the court on the motion.

D. C. Dawkins in pro. per. for the motion.

H. Bisbee, Jr., contra.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In order to a fair consideration of this motion it is necessary to give to some extent a history of the case in which it is made.

It is an action of ejectment which has been commenced,

and which had proceeded to final judgment before the code became operative. The first appeal from this judgment was taken after the code became operative and when it was in force. Paragraph 3 of section 383 of the code provides that its provisions shall apply to future proceedings in actions or suits heretofore commenced and now pending or determined in three enumerated cases, one of which is "after a judgment or order, to the proceedings to enforce, vacate, modify or reverse it, including the costs of an appeal." That is this case.

The first appeal of April 22, 1876, was taken under the code. The next of December 13, 1879, was taken under the code. The next of May 11, 1880, was taken under the code; and this the last appeal is taken in the same way. Is this last appeal prosecuted after the repeal of the code properly prosecuted under it? The 11th section of the act (Chapter 1938, Laws,) repealing the code provides that all suits already commenced * * * shall be proceeded in as if this act had not passed. It is thus clear beyond question that this case is, as it was described in the opinion rendered and case stated upon the first appeal of April 22, 1876, (16 Fla., 198,) "An action of ejectment * * * the plaintiff prosecuting the appeal under the provisions of the code."

The first ground upon which this motion to dismiss is made is that there is no lawful appeal bond.

The code does not require a bond upon an appeal, an undertaking is required, and while the copy of the undertaking which appears in the record here is fatally defective, in that it is for one hundred and fifty instead of two hundred and fifty dollars, yet it is admitted by the respondent that the original on file in the Circuit Court is for two hundred and fifty dollars. This is perhaps a jurisdictional question, the code providing that to render an appeal effectual for any

purpose this undertaking or a deposit must be made. As to this ground of the motion, therefore, we will direct a certiorari to bring up a correct copy of the undertaking in this case as filed in the Circuit Court, and if it is in the sum of one hundred and fifty dollars the appeal will be dismissed. If it is for two hundred and fifty the motion will be denied.

This undertaking is not required to be approved by the Judge or Clerk.

The next ground upon which the dismissal of the appeal is sought is because there is no case or exceptions as required by the code.

The appeal here is taken by plaintiff from a judgment for defendant upon his motion to arrest judgment upon a verdict for the plaintiff.

No such thing as a motion in arrest of judgment was known to the code, and a case and exceptions were applicable to a motion for new trial. The action of the court in rendering judgment upon a motion in arrest of judgment is not taken with reference to facts in evidence, instructions or other matters which are not in the record, except so made by a bill of exceptions or case. This action is upon matters necessarily within the record, matters intrinsic exclusively, and an exception or case is not required to have a review of such action. If the error is "apparent in the record," no exception is necessary, such as in the case of error in a judgment upon demurrer or upon a motion in arrest of judgment.

The remaining grounds upon which a dismissal is sought are that there is no final judgment from which an appeal can be taken, and that this appeal is from an interlocutory judgment from which two appeals have been dismissed.

The judgment here is, "that the plaintiff take nothing by his declaration in this cause, and that defendant do have

and recover of the plaintiff his costs now taxed at —— dollars and —— cents."

This judgment, though not very formal in its very terms, disposes of the subject matter of the litigation, and that is all that is necessary. No further action can be taken as to the merits of this controversy while it remains in force. 5 Texas, 450; 9 Mo., 345; 25 Texas, 319; 24 Texas, 522; 51 Mo., 468. There may or may not be further proceedings as to taxation and costs, but the judgment is none the less final on that account, as it is a final disposition of the subject matter of the litigation.

The motion is denied.

A certiorari having issued, and return thereto being made, and it showing that the appeal undertaking was in the sum of $250, the case was submitted.

The facts are stated in the preceding and following opinions.

H. Bisbee, Jr., for Appellant.

D. C. Dawkins for Respondent.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This is a case under the code. It has been before this court several times and in various forms, upon appeal and upon motion to dismiss the appeal. The facts and history of the case may be learned by referring to 16 Fla., 198; 17 Fla., 555, 550, 811; and to the opinion upon the motion to dismiss this appeal decided at this term of the court. The second and third appeals were dismissed for the reason that there was no final judgment. Subsequent to that decision, and on the 23d day of May, 1881, final judgment was perfected and this appeal is here. After verdict in favor of the plain-

tiff, the defendant, Dawkins, moved in arrest of judgment. The court granted the motion, arrested the judgment, and the final judgment so entered is upon this motion in arrest, and adjudges "that the plaintiff take nothing by his declaration in this cause, and that the defendant do have and recover of the plaintiff his costs," &c.

The only pleadings in the case were a declaration and plea. The declaration was in ejectment to recover a piece of land in Jacksonville, and the plea was simply "not guilty." There was no objection made or exception taken to the form of the pleadings. Motions in arrest of judgment arise from *intrinsic* causes appearing upon the face of the record. 2 Blackstone,393-4; Murray vs. The State, 9 Fla., 246.

"This is an invariable rule with regard to arrests of judgment upon matter of law that whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to overthrow the action or plea." This question, the only one arising in this case, is in fact settled by the opinion, *ante*, on the motion to dismiss the appeal. Judgment reversed and final judgment on the verdict below ordered.

ANTONIO WORDEHOFF, APPELLANT, VS. JOHN R. EVERS AND JACKSON BYRD, APPELLEES.

1. An injunction may be dissolved upon motion and due notice, either before or after answer filed.
2. A Court of Equity cannot entertain a bill to review and reverse a judgment of a Justice of the Peace for errors committed on the trial and to set aside an execution upon such judgment, or to set aside an execution illegal or void, and to enjoin a levy upon personal property, there being ample remedies at law.

Appeal from the Circuit Court for Hillsborough county. The facts of the case are stated in the opinion.

James T. Magbee for Appellant.

Joseph B. Wall for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

Appellant filed a bill for an injunction against Evers, a Justice of the Peace, and Byrd, a Constable, to enjoin the sale of appellant's personal property under an execution issued by the Justice. An injunction was granted, upon filing the bill, and before answer, on motion of appellees, was dissolved and the bill dismissed upon the ground that there were no equities in the bill; whereupon the complainant appealed, and assigns causes for reversal that the court erred in holding that there were not sufficient equities in the bill, and in dismissing the bill, and dissolving the injunction before answer.

There can be no question that if the bill contained no grounds for equitable relief, the injunction should have been refused in the first instance. This being the case, the court should seek the earliest opportunity to right itself As a question of mere practice it is provided by statute that in all cases the court may, on motion and due notice, either before or after answer filed, dissolve any injunction that may have been granted. Th. Dig., 453, §2.

Were there equities in this bill? It alleges that on complaint before Evers, a Justice of the Peace, by one Mrs. Clark, a warrant was issued by him for the arrest of a third person for an offence, and appellant had become security for costs in this proceeding. After two trials before the Justice a verdict of acquqittal was rendered, and the Justice issued execution directing the Constable to seize "so much of the estate of A. Wordehoff as will make the sum of

seventy dollars and twenty-five cents, which in a Justice's Court were adjudged to for his debt of cost of suit," &c. Under this writ, Byrd, Constable, levied upon appellant's cattle. Appellant made his affidavit under the statute, alleging the illegality of the writ, and delivered it to the Constable, and the Justice on receiving the same refused to act thereon and determine the question of illegality as required by law, and the Constable will proceed to sell the cattle, unless restrained by injunction which is prayed.

The rule is that except in peculiar or extraordinary cases (of which this is not one) Courts of Equity have no jurisdiction to enjoin a levy or a trespass upon property, or to enforce a mere legal right to it where there was a clear remedy at law. 12 Fla., 393; 8 ib., 350; 13 ib., 281; 14 ib., 366; 15 ib., 403; 16 ib., 258; ib., 261; High on Inj., §30, 31, and all the authorities. Of course where a statute expressly confers upon Courts of Equity jurisdiction of particular matters, such matters are taken out of the general rule, but there is no such statute embracing this case.

While it appears from the bill that there were errors and irregularities in the conduct of the trial before the Justice, and no authority existed for issuing the execution, and the execution itself appears to be void upon its face, the remedy was clearly at law.

If the judgment for costs was erroneous it could be corrected by motion or by appeal.

The execution being unauthorized and void, the Justice should, upon proper application, decide the question, and if he refuse to do so, the Circuit Court would compel him to hear and decide it. If then he decide wrong, an appeal would be the proper remedy.

These statutory remedies afford the means of accomplishing relief even beyond that sought by this bill.

The decree of the Circuit Court dissolving the injunction and dismissing the bill is affirmed, with costs.

MARY HODGES, ET AL., APPELLANTS, VS. MILES PRICE, APPELLEE.

1. The promissory note of a married woman is void. Such note is not effective to bind her person either at law or in equity; neither the Constitution nor the statutes give her to this extent the power of a *feme sole*.
2. Where a mortgage was executed by a married woman and her husband upon her separate property, to secure the payment of a simple promissory note made by her, the bill for the foreclosure of the mortgage not alleging that the amount so secured was the purchase money promised to be paid by her for the said mortgaged property, or in any other way showing by his pleading that her separate property should be subject to the payment of the amount claimed: *Held*, that the complainant could not thus charge such separate property of the wife for the amount due upon such note and so secured by mortgage.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

Meek & Deans for Appellants.

S. Forbes Doggett for Appellee.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

In July, 1879, Miles Price filed his bill against Mary Hodges and John Hodges, her husband, to foreclose a certain mortgage given by them to the complainant, such mortgage covering a lot of land in Brooklyn, in the county of Duval. The bill charges that on the thirteenth day of May, A. D. 1876, the said Mary Hodges made her certain note for sixty-six dollars and twenty cents, payable twelve months after date with interest at the rate of twelve per cent. per annum, for value received, and delivered the same to the complainant. That to secure the payment of the

seventy dollars and twenty-five cents, which in a Justice's Court were adjudged to for his debt of cost of suit," &c. Under this writ, Byrd, Constable, levied upon appellant's cattle. Appellant made his affidavit under the statute, alleging the illegality of the writ, and delivered it to the Constable, and the Justice on receiving the same refused to act thereon and determine the question of illegality as required by law, and the Constable will proceed to sell the cattle, unless restrained by injunction which is prayed.

The rule is that except in peculiar or extraordinary cases (of which this is not one) Courts of Equity have no jurisdiction to enjoin a levy or a trespass upon property, or to enforce a mere legal right to it where there was a clear remedy at law. 12 Fla., 393; 8 ib., 350; 13 ib., 281; 14 ib., 366; 15 ib., 403; 16 ib., 258; ib., 261; High on Inj., §30, 31, and all the authorities. Of course where a statute expressly confers upon Courts of Equity jurisdiction of particular matters, such matters are taken out of the general rule, but there is no such statute embracing this case.

While it appears from the bill that there were errors and irregularities in the conduct of the trial before the Justice, and no authority existed for issuing the execution, and the execution itself appears to be void upon its face, the remedy was clearly at law.

If the judgment for costs was erroneous it could be corrected by motion or by appeal.

The execution being unauthorized and void, the Justice should, upon proper application, decide the question, and if he refuse to do so, the Circuit Court would compel him to hear and decide it. If then he decide wrong, an appeal would be the proper remedy.

These statutory remedies afford the means of accomplishing relief even beyond that sought by this bill.

The decree of the Circuit Court dissolving the injunction and dismissing the bill is affirmed, with costs.

ignorant of ever having executed the note or mortgage; that they never executed the note or mortgage with a knowledge that they were thereby admitting an indebtedness to the complainant; that the defendant, Mary, had bought the property of complainant and had fully paid for it; that defendants are old and ignorant, can neither read nor write; that no note or mortgage was read or explained to them, and that they had no knowledge that they, or either of them, had signed any obligation whatever running in favor of the complainant.

Several errors are assigned by the appellants, generally arising upon the evidence and hearing of the cause, one of which only will it be necessary to consider, to-wit: That at the time of the making and execution of the promissory note and the mortgage, the defendant, Mary Hodges, was a married woman under coverture of John Hodges, as appears by the bill of complaint, and that therefore her note is void, and that the mortgage given to secure the note is also void.

This subject of the liabllity of the married woman upon her promissory note was very fully discussed by this court in the case of Dollner, Potter & Co. vs. Snow, *et als.*, 16 Fla., 86. In that case the plaintiffs endeavored to recover of the defendants, Frances Snow and Jennie P. Spear, upon upon a promissory note for seven hundred dollars made and delivered to Walter Ginnity. The makers of the note were both married women. The complaint alleges that the consideration for which the note was given was property purchased and held by the married women as their "separate estate." This court there say: The conclusion we reach upon principle and authority is, that the wife's promissory note is not effective to bind her person either at law or in equity, and that neither the Constitution nor the statute gives her to this extent the power of *feme sole*." No ques-

tion arises here as to whether her separate property could be charged with the amount of such note as being given for the purchase money. The note does not show it, and there is no allegation of that fact in the bill of complaint.

In the case of the American Insurance Co. vs. Avery and Wife, 60 Ind., 566, the court say: "It is the settled law of this State that a married woman, during her coverture, cannot make a promissory note which will be valid and binding on her."

In addition to the cases cited upon this point in Dollner, Potter & Co. vs. Snow, *et als.*, see Thomson vs. Weller, 85 Illinois, 197; Yale vs. Dederer, 22 N. Y., 450, and 68 N. Y., 329; Wilson & Hunting vs. Jones, 46 Md., 349; Huntley vs. Whitner, 77 N. C., 392.

Inasmuch as the bill of complaint in this cause shows that it is simply an effort to foreclose a mortgage given to secure the payment of a promissory note made by a married woman, the decree of foreclosure must be reversed and the cause remanded, with instructions that the bill be dismissed without prejudice to the complainant, by proper proceedings to recover the purchase money, if any there be due, for the mortgaged premises.

ROBERT RAWLINS, ADMINISTRATOR, ET AL., APPELLANTS, VS. AMANDA RAWLINS, ET AL., APPELLEES.

1. A widow, and the children born of a cohabitation during the divorce proceedings, and subsequent to a decree of divorce granted at the suit of the husband, have an equity, upon the death of the husband, to set aside such decree of divorce if it was procured by the fraud and imposition of the husband.
2. The usual method by which the wife may set aside a fraudulent decree of divorce obtained by the husband, is a proceeding upon no-

tice to the husband in the same case. Where, however, the husband is dead, and there are children, the result of cohabitation during the divorce proceedings, and the widow and children seek to set aside the divorce and recover their interest in the estate, they may proceed by an original bill in the nature of a bill of review against the administrator and the children born before the decree of divorce. Such a bill is not objectionable upon the ground either of misjoinder or multifariousness.

3. The right of the "wife" (widow) to letters of administration upon the estate of her deceased husband is not absolute, but conditional upon her application. She failing to apply for letters, others, as provided by the statute, may be appointed. Act of November 20, 1828, Section 7, Duval 169, Thompson's Digest, 196.

Appeal from the Circuit Court for Orange county.

Amanda Rawlins, in her own right, "and as next friend of Gartha Rawlins, Benjamin Rawlins and Daniel Rawlins," files this bill against Robert Rawlins, as administrator of Benjamin Rawlins, and as one of the heirs at law of Benjamin Rawlins, deceased, and against Hezekiah Rawlins, Dorcas Rawlins, Charity Dyal, George W. Dyal, her husband, Sarah Blackwelder and Daniel Blackwelder, heirs at law of Benjamin Rawlins, deceased.

The plaintiff alleges that she married Benjamin Rawlins on the 28th June, 1868; that she cohabited with him up to and after March 3, 1870, discharging all of her marital duties; that at the last date, her husband, Benjamin, through misrepresentation and fraud, obtained in the Circuit Court of Volusia county a decree of divorce; that said Benjamin frequently persuaded and importuned her to leave his place, promising that he would take care of her, and that privately they would be and live as husband and wife, representing that he had certain objects to accomplish which would benefit both of them; that from her great love and confidence in him she acted as he requested, he maintaining the same intimacy and intercourse with her as before; that to better carry out his fraud he induced her to set fire

tion arises here as to whether her separate property could be charged with the amount of such note as being given for the purchase money. The note does not show it, and there is no allegation of that fact in the bill of complaint.

In the case of the American Insurance Co. vs. Avery and Wife, 60 Ind., 566, the court say: "It is the settled law of this State that a married woman, during her coverture, cannot make a promissory note which will be valid and binding on her."

In addition to the cases cited upon this point in Dollner, Potter & Co. vs. Snow, *et als.*, see Thomson vs. Weller, 85 Illinois, 197; Yale vs. Dederer, 22 N. Y., 450, and 68 N. Y., 329; Wilson & Hunting vs. Jones, 46 Md., 349; Huntley vs. Whitner, 77 N. C., 392.

Inasmuch as the bill of complaint in this cause shows that it is simply an effort to foreclose a mortgage given to secure the payment of a promissory note made by a married woman, the decree of foreclosure must be reversed and the cause remanded, with instructions that the bill be dismissed without prejudice to the complainant, by proper proceedings to recover the purchase money, if any there be due, for the mortgaged premises.

ROBERT RAWLINS, ADMINISTRATOR, ET AL., APPELLANTS, VS. AMANDA RAWLINS, ET AL., APPELLEES.

1. A widow, and the children born of a cohabitation during the divorce proceedings, and subsequent to a decree of divorce granted at the suit of the husband, have an equity, upon the death of the husband, to set aside such decree of divorce if it was procured by the fraud and imposition of the husband.
2. The usual method by which the wife may set aside a fraudulent decree of divorce obtained by the husband, is a proceeding upon no-

death; that he partially performed his promise, and provided for and supported her for a time, but he kept concealed from her the fact that he was still prosecuting the divorce suit, or that he intended to obtain a decree; that she still continued to live with him as his wife, and that she had by him children, Gartha, Benjamin and Daniel, the first being born on the 24th November, 1870, the second on the 26th November, 1872, and the third on the 26th day of December, 1878; that on the third day of March, A. D. 1870, in the Circuit Court of the Seventh Judicial Circuit in Volusia county, he obtained a decree of divorce, the ground of divorce being extreme cruelty, wilful, obstinate and continued desertion for one year, and the habitual indulgence during the time she was his wife of a violent and ungovernable temper, all of which charges and the facts set up in support thereof the plaintiff alleges are untrue; that of the decree of divorce she was never informed by said Rawlins, or otherwise. Plaintiff then alleges that her said husband died on the 25th December, 1879, intestate, leaving real estate to the value of $10,000, and personal property to the value of $10.000, leaving the defendants, the plaintiff and her three children, Gartha, Benjamin and Daniel, surviving him, his heirs at law; that in the year 1880 the defendant, Robert Rawlins, applied for and received letters of administration upon his estate, and now has possession of the same as such administrator; that said administrator on account of said fraudulent decree refuses to recognize the three after-born children and the plaintiff as legitimate heirs of the deceased entitled to a share in the property, claiming that the defendants are the sole heirs at law. Plaintiff claims that she is the lawful wife of the deceased and entitled to the administration of the estate of her husband; that the letters granted to his son are void, should be set aside, and that letters should be granted to her.

Plaintiff alleges further that the administrator and the other defendants are using and appropriating the property of the estate, and that they should be enjoined from such action until the rights of plaintiffs are determined.

Plaintiff prays that the decree of divorce may be vacated and set aside as null and void; that she be declared the widow of the deceased, and her three children heirs at law of the intestate with the other defendants; that the further administration of the estate be declared to belong to plaintiff; that the letters of administration issued to Robert Rawlins be vacated and the said Robert be decreed to turn over the property to her for administration, and for an injunction restraining all the defendants from converting or disposing of any of the estate, or further administering the same, and for subpœna. The bill was filed on the 12th day of January, A. D. 1881, and subpœna served March 8, 1881.

To this bill a demurrer was interposed, which was overruled.

From this order this appeal is taken.

C. M. Cooper and *E. K. Foster* for Appellants.

John W. Price for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The grounds of the demurrer urged upon the hearing of this appeal were several in number. We examine them without reference to the order of their statement.

First. That the said infant plaintiffs, if necessary parties to this suit, are not made parties by the bill.

Plaintiff, Amanda Rawlins, sues in her own right and as next friend of Gartha Rawlins and the others.

We had occasion to examine this question in the case of

Appeal from the Circuit Court for Hillsborough county. The facts of the case are stated in the opinion.

James T. Magbee for Appellant.

Joseph B. Wall for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

Appellant filed a bill for an injunction against Evers, a Justice of the Peace, and Byrd, a Constable, to enjoin the sale of appellant's personal property under an execution issued by the Justice. An injunction was granted, upon filing the bill, and before answer, on motion of appellees, was dissolved and the bill dismissed upon the ground that there were no equities in the bill; whereupon the complainant appealed, and assigns causes for reversal that the court erred in holding that there were not sufficient equities in the bill, and in dismissing the bill, and dissolving the injunction before answer.

There can be no question that if the bill contained no grounds for equitable relief, the injunction should have been refused in the first instance. This being the case, the court should seek the earliest opportunity to right itself. As a question of mere practice it is provided by statute that in all cases the court may, on motion and due notice, either before or after answer filed, dissolve any injunction that may have been granted. Th. Dig., 453, §2.

Were there equities in this bill? It alleges that on complaint before Evers, a Justice of the Peace, by one Mrs. Clark, a warrant was issued by him for the arrest of a third person for an offence, and appellant had become security for costs in this proceeding. After two trials before the Justice a verdict of acquittal was rendered, and the Justice issued execution directing the Constable to seize "so much of the estate of A. Wordehoff as will make the sum of

seventy dollars and twenty-five cents, which in a Justice's Court were adjudged to for his debt of cost of suit," &c. Under this writ, Byrd, Constable, levied upon appellant's cattle. Appellant made his affidavit under the statute, alleging the illegality of the writ, and delivered it to the Constable, and the Justice on receiving the same refused to act thereon and determine the question of illegality as required by law, and the Constable will proceed to sell the cattle, unless restrained by injunction which is prayed.

The rule is that except in peculiar or extraordinary cases (of which this is not one) Courts of Equity have no jurisdiction to enjoin a levy or a trespass upon property, or to enforce a mere legal right to it where there was a clear remedy at law. 12 Fla., 393; 8 ib., 350; 13 ib., 281; 14 ib., 366; 15 ib., 403; 16 ib., 258; ib., 261; High on Inj., §30, 31, and all the authorities. Of course where a statute expressly confers upon Courts of Equity jurisdiction of particular matters, such matters are taken out of the general rule, but there is no such statute embracing this case.

While it appears from the bill that there were errors and irregularities in the conduct of the trial before the Justice, and no authority existed for issuing the execution, and the execution itself appears to be void upon its face, the remedy was clearly at law.

If the judgment for costs was erroneous it could be corrected by motion or by appeal.

The execution being unauthorized and void, the Justice should, upon proper application, decide the question, and if he refuse to do so, the Circuit Court would compel him to hear and decide it. If then he decide wrong, an appeal would be the proper remedy.

These statutory remedies afford the means of accomplishing relief even beyond that sought by this bill.

The decree of the Circuit Court dissolving the injunction and dismissing the bill is affirmed, with costs.

fraud, and the court held that the administrator and heirs were proper if not necessary parties.

The next question raised by the appellant under this demurrer, which we examine here, is, whether this remedy by original bill in the nature of a bill of review, so far as the divorce is concerned, and an original bill in the matter of the administration, so far as it embraces other matters, is a remedy which a court of equity will sustain. In cases where the husband is alive and the wife seeks to set aside a decree of divorce upon the ground of fraud upon his part, the usual method is a proceeding in the same cause after notice to him. Here the husband is dead, and we are at a loss to see how the purposes of this suit can be affected by proceedings in that suit. But however this may be, the proceeding by an original proceeding or an original bill in the nature of a bill of review has been sanctioned by many courts of equity in like cases, and we see no objection to it. 23 Wis., 452; 2 P. Wms., 73; 34 Ala., 455; 3 Barb., 616; 45 N. H., 110; 4 J. J. Mar., 501; 37 Miss., 198; 62 Penn., 308; 5 Clark (Iowa), 232.

It is insisted that this suit is barred by the statute of limitations. The cause of action accrued here to the widow and the children after the death of the husband. He died on the 25th December, 1879, and the "action" was commenced March 8, 1881, a period of less than one year and three months. There is no section of the statute possibly applicable to this bill which would operate as a limitation in that time.

The only other question remaining to be considered is the matter of the removal of the present administrator, the son, and the substitution of the wife.

The wife does not allege that she ever applied for letters. She having failed to apply, the appointment of the son was proper. The bill should be amended by striking out that

portion of it which seeks his removal. The removal here is sought upon the ground that the wife has an absolute right to administer, whereas it is conditional upon her application. This action as a matter of course will not prejudice any right which she or her children may have to his removal for cause or conduct should they succeed in establishing the alleged fraud.

This, we think, disposes of all the questions in the case.

The order overruling the demurrer is reversed. The case will be remanded, with directions to enter an order sustaining the demurrer, with leave to amend the bill in such particulars as the foregoing opinion indicates is deemed necessary by this court. The costs of this appeal will be taxed equally against the parties, as the principal grounds upon which the demurrer is here sustained were not urged in the Circuit Court, and for further proceedings.

CRUMP, ADMINISTRATOR, APPELLANT, VS. PERKINS, ADMINISTRATOR, APPELLEE.

1. The objection to a supplemental bill in equity made at the hearing, that it seeks to maintain the suit upon new facts, which have occurred since the filing of the original bill, and which make a new case, cannot be heard. Such an objection is waived by omitting to demur to the bill upon that ground and going into a hearing upon the merits.
2. Upon sustaining a plea it is not a matter of course for the court to direct or award an issue. The plaintiff should ask leave to put the facts of the plea in issue, or should undertake to reply, if he so desires. Where the notice by the plaintiff of the hearing upon the plea was accompanied by a notice of hearing upon the merits to be had next day, and for a final determination, the court very properly presumed that the plaintiff, instead of wishing to reply to the plea, desired the action of the court to be final.

3. A plea and answer in support thereof is one pleading. Such answer is no distinct part of the defense. It must be treated as a part of the plea. While a replication in such case restricted to the answer is improper, yet after it is treated by the court and the parties as putting in issue the matters of fact alleged in the plea and answer, and after testimony applicable to such issue, and setting the cause down for final hearing and decree upon the merits, this court will not, upon appeal, reverse such decree, unless there is error upon the merits.

Appeal from the Circuit Court for Madison county, to which court the case was transferred from Leon county.

This was a bill filed on the 27th January, 1870, in the Circuit Court for Leon county by appellant against William Perkins, and upon his death revived against his administrator, John H. Perkins. Complainant alleges that at the time of Simpson's death a mercantile copartnership existed between himself and Simpson; that said Perkins upon the death of Simpson retained the assets of the firm as surviving partner. Plaintiff prays an account of the partnership matters and a decree for what may be found due him. Defendant answered, admitting the partnership, averring *inter alia* that the effects of the copartnership consisted of notes and accounts, a number of which were worthless; that the firm was indebted to a considerable extent; that he has proceeded to collect the debts as speedily as he could, and applied the moneys to the payment of the debts, and submits to an accounting. He alleges further that he was unable to read and write, and that Simpson kept the books, and had during his lifetime the entire management of the business. A statement of account prepared by an accountant of their mutual selection is filed as an exhibit. Defendant avers that there are erroneous entries in the books, and claims that those errors were admitted by Crump, the plaintiff.

Upon bill and answer there was a reference to a master

and master's report, but there is no account stated by the master which could be made the basis of a decree. This report contains references to many matters connected with the accounts, but the determination of the questions involved in this appeal does not involve their consideration. To this report there were exceptions by the defendant, and it was not acceptable to either party. Upon an *ex parte* application, and after leave granted, the complainant, on the second of July, A. D. 1875, filed a supplemental bill. After setting forth the proceedings already had in the case the plaintiff alleges that both parties being dissatisfied with the report of the master agreed to disregard it and make an amicable settlement between themselves, and that in the presence of their respective counsel they executed an agreement which provided that the bill should be dismissed and the settlement made should be final of all demands between the parties arising out of the bill; that there was a classification of the assets made, but no actual decision had; that this agreement provided that the notes and accounts should be divided between the parties as early as practicable, but from various causes it did not become practicable to make said division until July 31, 1872, and that consequently the bill was not dismissed; that on the 31st July 1872, complainant and the said Perkins, with James Conner and Daniel Switzer, principal debtors of said firm, met at the office of complainant's counsel, and at the request of said parties a statement was drawn up by Bolling Baker, showing the solvent assets of said firm, including the amounts due by each party to the firm. A copy of the statement is made an exhibit to the supplemental bill. Complainant alleges further that a division was made of the notes which the parties considered solvent and an equal portion assigned to each, the largest notes being those of Switzer and Conner, who executed new notes for the bal-

ances due by them, which notes were left with complainant's counsel to abide the final settlement between the parties; that this statement shows that Perkins was in debt to the firm $1,477.36, to one-half of which sum Crump, as administrator of Simpson, is entitled; that upon application subsequently made by plaintiff to Perkins for the payment of this sum he, Perkins, declined to pay anything, alleging that the statement was erroneous. Plaintiff prayed for a decree for the sum of $738.68, less $50, or that another reference be had and account stated by a master.

To this bill, on the 4th of October, 1875, the defendant interposed a demurrer and plea. The grounds of the demurrer were, because it appeared by the bill and exhibits that there had been a full settlement and adjustment of the matters referred to and because there was no equity in the bill. The plea is defective, in that it does not set out any matter of fact independent of the demurrer, but pleads the "above named settlement and adjustment," meeting the settlement set out in the bill. No attention seems to have been given it. The demurrer was overruled on the 28th of June, A. D. 1876. After various proceedings looking to a revival of the suit which it is unnecessary to mention, and on the 3d of February, A. D. 1880, what the defendant called a plea and answer and demurrer was filed by defendant. "For plea and demurrer" to the bill, "or unto so much and such parts thereof as this defendant is advised, is or are material or necessary for him to plead or make answer unto, this defendant saith." That he admits the facts as to filing of the original bill and the proceedings set forth up to and including the settlement had in the year 1871, and pleads said compromise and settlement as a bar to the account prayed for by the plaintiff, avering willingness upon his part to abide by and perform all the terms

of said settlement so far as they are obligatory upon him. Through the answers filed the defendant denies that the statement marked exhibit "B" was drawn up and exhibited as stated by plaintiff, or that any sum as stated in the bill was due by Perkins to Crump, giving in detail the facts connected with the matter, and affirming that exhibit "A" is the true and final settlement between the parties. To this answer there was a replication filed. So far as this paper purported to be a demurrer no attention seems to have been given to it. There was no particular replication to the plea.

After testimony taken covering both the subject-matter of the answer as well as the plea, on the 9th of December, A. D., 1880, the defendant's counsel was served by plaintiff's attorneys with a notice that on the 20th of December they would make application to the Judge to proceed at once to a hearing of argument of the plea filed by the defendant, stating that said plea had been set down for a hearing on the first of March, 1880, as well as that on the next day, or as soon thereafter as counsel could be heard, they would ask the Judge to proceed to a final hearing and determination of said cause, "the same being set down for hearing by plaintiff and now ready for final determination."

The transcript of the record then recites that on the 17th of January, A. D. 1881, "in pursuance of the above notice this cause came on to be heard, * * * and after judgment of counsel judgment was rendered in words and figures as follows." After stating the title of the case the decree continues: "This cause came on to be further heard, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to-wit: That upon the law and the merits of the case the plea of defendant, John H. Perkins, as the administra-

tor, &c., of the estate of William Perkins, deceased, be sustained, and that the supplemental bill of John R. Crump, who sues as the administrator of Lewis T. Simpson, deceased, complainant, be dismissed with costs."

It is from this decree that this appeal is taken.

D. S. Walker, Jr., for Appellant.

R. B. Hilton, for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The respondent in this case seeks, independent of its merits, to maintain the final decree dismissing the bill upon its merits on account of matters in connection with the supplemental bill. It is objected that it was filed *ex parte* and without notice. After general demurrer, plea and answer in support thereof, and hearing upon the merits and final decree, the want of notice if necessary in such case is waived. It is also urged that by this bill new matters occurring since the filing of the original bill constituting a new case are sought to be brought forward by way of supplement; that the case made by the bill, if any case is made, is the subject-matter of an original suit in equity. If any such objection as this was made at any time in the Circuit Court the record does not disclose it. The first pleading in response to this supplemental bill is a general demurrer for want of equity. This being overruled, there was a plea and answer in support thereof and after testimony a final hearing.

This objection, even if it be a good one, must, under these circumstances, be regarded as waived. There was here a general demurrer for want of equity. No such ground as that the matter of the supplemental bill is the subject of original rather than supplemental proceedings was set up

in the demurrer. In the case of Pinch vs. Anthony, *et al.*, 10 Allen, 477, it appeared "that at the time of filing the original bill the plaintiff had no cause of action. The plaintiff afterwards filed a supplemental bill setting forth certain facts that had occurred during the pendency of the suit." It was objected that the facts set forth in the supplemental bill could not be considered in that suit, but that the bill should be dismissed and the plaintiff be left to bring a new suit, if he has good cause of action. Say the court: "We have found no authority that goes so far as to authorize a party who has no cause of action at the time of filing his original bill to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill. It would seem to be contrary to principle to allow this to be done. Milner vs. Milner, 2 Edw. Chy., 114, is an authority against allowing a new cause of action to be stated in a supplemental bill. But the plaintiff may, by means of a supplemental bill, introduce into his case facts that have occurred since the original bill was filed. The extent to which this may be done is not definitely settled. But if he goes too far in this respect the defendant has opportunity to object to it when leave is asked to file the supplemental bill, (Pedrick vs. White, 1 Met., 76,) or by demurrer to the bill for that cause after it is filed. In this case the defendant did demur, but did not present this as a ground of demurrer. 8 Allen, 536. The cause was sent to a master, and was recommitted to him by consent of both parties for the purpose of being fully heard upon its merits, and it has been so heard and his report embraces every matter that would have been modified if a new bill had been filed. The objection to the supplemental bill ought therefore to be regarded as waived. Pingree vs.

Coffin, 12 Gray, 288, 333; Story's Eq. Pldg., §528, and note; Underhill vs. Van Cortlandt, 2 John. Chy., 369." See also 2 Dan'l Chy. Pldg. & Prac., Cooper's Ed., 1,524, and note. In the case now before this court the objection was not taken by demurrer, and there was testimony taken after plea and answer in support thereof. Whether this objection was urged at the hearing in the Circuit Court we know not. The transcript of the record is silent as to the matter. But even if it was the objection, according to the principle of the case in the 10th of Allen and the cases cited above, should have been disregarded. It is unnecessary to enter into a discussion here to show that such objections as these, not necessary to the determination of the merits of a controversy, should be made before the hearing when quite all of the expenses of the litigation have been incurred. As remarked by Chancellor Kent in Underhill vs. Van Cortlandt, 2 John. Chy., 369: "It would be an abuse of justice if the defendant was to be permitted to protract a litigation to this extent, and with the expense that has attended this suit, and then, at the final hearing, interpose with this preliminary objection."

This disposes of the matter presented by the respondent as the ground upon which the decree should be sustained. The appellant asks a reversal upon the ground that the hearing being had upon the plea it was error for the court to dismiss the bill; that the decree should have been interlocutory, permitting him to take issue upon it. This is not the case made by this record. The notice was for a hearing upon the plea to be had on one day and for a final hearing and determination of said cause on the next day. The final hearing was had long after the time fixed for either hearing, and the decree of the court was, that upon the law and merits of the case the plea of the defendant be sustained and the bill dismissed. This is a decree not sim-

ply upon the face of the plea accepting its allegations as true. The case was before the court upon plea, answer in support thereof, replication in form to answer and testimony, and the court considered the case not solely with reference to the sufficiency of the plea upon its face, but with reference to the testimony taken, which was entirely applicable to the allegations of the bill, to the averments of the plea and the answer in support of it. In addition to this it is not a matter of course to direct an issue upon a plea being sustained. In this case the plea and answer in support thereof went to the whole bill. The bill asked for a decree for a specific sum as due upon an alleged mutual settlement of partnership accounts or for a decree for a reference to settle the partnership account. The plea and answer in support thereof set up an alleged antecedent settlement, the answer as well as the plea denying any subsequent modification of the settlement, or that any sum was due plaintiff on any account. "Where a plea to the whole or part of a bill is allowed upon argument, *the plaintiff, unless he undertakes to reply to the plea, or the court otherwise directs* is to pay to the party by whom the plea is filed the costs of the plea, and if the plea is to the whole bill the costs of the suit also, and in such last-mentioned case the order allowing the plea is to direct the dismissal of the bill." Dan'l Chy. Pldg. & Prac., 698.

The plaintiff here in no manner undertook to reply to the plea, and it was proper that the order allowing the plea should dismiss the bill, as the plaintiff in no way suggested a desire to reply to it and go into proofs, but on the contrary gave notice that he would on the next day after the hearing of the plea ask the Judge to proceed to a final hearing, avering that the case was "now ready" (meaning at the time the notice of hearing upon the plea and for final hearing was given,) "for final determination." Under

Rules 52 and 55 of the Rules governing Courts of Equity, this plea should have been replied to by plaintiff or set down for argument by the rule day next succeeding the rule day on which it was filed, and if allowed upon the hearing the defendant would have been entitled to his costs, and unless leave to file replication to plea was asked for or the court otherwise ordered, the decree was final. The rule where the plea is allowed and the plaintiff fails to reply is stated by Barbour, (1 Barb. Chy. Prac., 121,) is that "not only the validity of the plea as a bar is admitted, but the truth of the facts set up in it; and of course the suit is at an end." The court may, without such application, direct upon a hearing that the benefit of the plea shall be saved to the defendant at the hearing. Here there was a hearing upon the plea as well as upon the facts disclosed at the final hearing, and that is to the plaintiff the most favorable method in which a plea can be considered. 3 Paige, 572; 1 Barb. Chy. Prac., 121, 122.

It is thus apparent that in the view in which this case has been discussed by the defendant and respondent, we can see no ground for a dismissal of the bill, which order he seeks to sustain, nor do we agree with the legal propositions upon which the appellant and plaintiff seeks to reverse the decree.

We will state our own view of the case as it was presented to the Circuit Court.

This is a case of a plea and answer in support thereof. The supplemental bill sets up an agreement, which it alleges provided for and agreed upon the terms of settlement which it alleges was carried out by subsequent agreement, under which subsequent agreement plaintiff claimed a sum was due him. The plea set up the first agreement as a final settlement, and the answer in support thereof denies any subsequent settlement as alleged, or that any sum was due.

Our general views in reference to such a pleading are given in the case of Hart Ex. vs. Sanderson's Administrators, 16 Fla., 264-268. "In such cases the plea and answer form but one defence, and the title of such pleading is properly the 'plea and answer,' or 'the joint plea and answer,' or 'the joint and several plea and answer,' and the only proper title to a replication in such case is a replication to 'the plea and answer.'" 1 Barb. Chy. Prac., 174. Upon argument of such a plea, if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled and ordered to stand for an answer only. 1 Barb. Chy. Prac., 120; Mit. Eq. Pldg., 304; 3 Atk., 304; Welford's Eq., 394. For a form of such plea and answer see 2 Newland's Chy., 127. Where there is such plea and answer the replication must be to the plea and answer. Welford's Eq., 214; Kirby vs. Buston, 5 Mad., 378; 1 Sim. & Stu., 135; 10 Sim., 285. A replication to the answer alone is not admissible because the plea and the answer are one pleading mutually dependent upon each other. Here it is true the replication is restricted by its terms to the answer, but after treatment of the case by the court and by the parties in taking testimony applicable as well to the averments of the plea as to the answer, and going into a hearing upon the merits in the same manner as if a properly framed replication had been filed, we know of no rule which would justify an appellate tribunal in reversing a decree in order to give the plaintiff the opportunity to reopen the case to take additional testimony, which opportunity has been given him, and of which so far as this record discloses he has fully availed himself. The practice in the English and American courts is after witnesses have been examined to allow the replication to be filed *nunc pro tunc* Mit. Chy., §523; Welford's Chy., §400; 1 Woods, 667; 1 Bibb, 277; 3 Blackf., 115; 12 Gill. & John., 271; 1 Ired. Chy., 117; 3 John. Chy., 363; 1 Bibb, 338.

In a case at law in the Supreme Court of the United States it was held that the fact that no replication was put in to two or three special pleas raising distinct defences is not a matter for reversal, the case having been tried below as if the pleadings had been perfect and in form. 7 Wall., 565. Certainly in a case in equity where there is only one plea and an answer in support thereof, to which all the testimony must necessarily be applicable, the mere omission to file a proper replication cannot be available upon appeal. In this case to reverse the decree for this reason would be to give the plaintiff an advantage on account of his own want of accuracy in framing his replication after he has had all the advantage it would have given him if correct.

We think, therefore, that in our treatment of the case we must regard any such irregularity as waived by the plaintiff treating the issues as properly made up. This brings us to the consideration of the case as it appears upon the pleadings and the testimony.

We do not propose to discuss the facts at length. After a bill to settle the partnership matter, a reference to a master and his report, these parties being each dissatisfied with the report as a final settlement of their differences, by their attorneys upon conference executed the following paper.

After stating the case the paper proceeds:

"The master's report in this case having been filed and exceptions thereto withdrawn, it is agreed between the parties to said cause that the same be dismissed and that each party pay his own costs, except the master's fee of fifty dollars, which having been paid by J. R. Crump, it is agreed that William Perkins shall refund to said Crump twenty-five dollars. It is further agreed that the accounts and notes having been assorted into three classes, namely, good, bad and doubtful, it is agreed that the attorneys in

said case shall proceed as early as practicable to divide said accounts equally between said parties, dividing to each party an equal amount of each class of said accounts and notes, and that upon said division said attorneys will execute their respective receipts to the respective parties for the notes and accounts divided to each, and that said accounts and notes remain in the hands of said attorneys respectively for collection or otherwise as either of the said parties may direct in reference to his own divided share of said notes, and that this be considered and is hereby declared to be a final setlement of all demands between said parties growing out of said suit.

"BOLLING BAKER,
"Attorney for J. R. Crump.
"R. B. HILTON,
"Attorney for William Perkins."

After executing this paper, at a subsequent day, Crump, William Perkins, who could neither read nor write, and John H. Perkins, his son, met at the office of Bolling Baker, Esq., for the purpose of dividing the notes as above agreed upon, the counsel of William Perkins being absent from the State, Crump's counsel, who seemed to have determined and stated the account, swears that he stated a general result of the account at that time, which, though not reduced to writing then, was subsequently reduced to writing by him. He states that he has no recollectoin of either of the parties agreeing in any exact words that they, or either of them, would be bound by such statements, but heard nothing to the contrary. This agreement was not then signed, this witness stating that both parties insisted upon leaving as soon as the result of the various calculations were arrived at, and that he thinks they left before statement "B" was drawn up in its present form. Statement "B" is as follows:

Statement of Final Settlement of Accounts between J. R. Crump and W. Perkins of the Firm of Simpson & Perkins.

Amount of good notes in hands of Messrs. Hilton, Walker & Baker, viz:		
Note of James Conner and interest		$2,407.78
Note of D. Gardner		382.42
Note of J. R. Crump, administrator of Simpson		108.07
		$2,892.30
To amount cash collected by W. Perkins on notes and accounts	$3,685.66	
By amount debts paid	2,208.30—	1,477.36
Total notes and cash good		$4,369.66
Of which Mr. Crump is entitled to receive from Mr. Perkins in cash	$738.68	
And in notes in Attorney's hands	1,446.15—	2,184.83
Of which Mr. Perkins is entitled to retain in cash.	$738.68	
And to receive in notes	1,446 15—	2,184.83
		$4,369.66

The $738.68 cash due Mr. Crump should bear interest from March 4, 1867, until paid; thus, cash, $738.68; interest at 8 per cent. to settlement.

John H. Perkins testifies that he was present at the date of this last alleged settlement; that Bolling Baker was to make it in conformity with the antecedent agreement for final settlement; that the papers were examined and classified; that a note signed by Connor & Carr they considered of sufficient value to divide by making two notes, and that the remainder of the papers were left in the hands of Bolling Baker for collection, and all the proceeds of said collections were to be equally divided; that Mr. Perkins paid $25, one-half of the fee of the master, and this was considered a final settlement.

J. B. Conner, who was present at this interview and settlement, says a note held by them against him was divided, and that he knew of no agreement between them at that

time, except that there was to be made on that day a division of all the notes and accounts, which he supposed was a full and complete settlement.

Without entering into any argument as to the effect of this testimony, we simply state our conclusion to be that everything done by plaintiff's counsel on this occasion, authorized by the defendant, was the classification and division of the notes and accounts.

The plaintiff's counsel was not given authority either at that or any other time to make himself the master in this case to state an account between the parties according to his views from the books. He was upon this occasion to classify the notes and accounts. This division he states he made, that both parties declined to take any of the accounts then before them; that both agreed they were all hopeless, and that they would be left with him, and if either Crump or Perkins could collect anything from them or use them in any way, each would account to the other for his share of the amount so realized. He states that he has never collected any of them, nor heard that Crump or Perkins ever did. This was the execution of the agreement made by the parties. The subsequent statement "B" made in the absence of, and not consented to, did not represent any division of the notes and accounts by Perkins & Crump, as they had agreed upon, but was the counsel's view as to what constituted a division of the "assets," which was his construction of the agreement, while no agreement to divide the "assets" was ever made, but a definite agreement to divide the notes and accounts after classification as to value. The agreement that Perkins, as a matter of final settlement, should pay as a debt due Crump twenty-five dollars, and the agreement, as admitted by Baker, that the accounts as collected were to be divided between them, is not consistent with the idea that Perkins upon this settle-

ment was understood to be the debtor of Crump to the amount of over seven hundred dollars. Again, Baker's evidence shows that the accounts and notes to be divided were in a package before that time made out by the master, and that *"the individual accounts of the partners were not drawn off, nor were they in the packages,* so far as I remember, with the other assets."

The decree is affirmed.

A petition for a rehearing was filed.

MR. JUSTICE WESTCOTT delivered the following opinion thereon:

This case, as we understand it after careful examination, is stated and decided in the opinion heretofore delivered. After examination of this petition we find no sufficient reason to grant a rehearing. It is therefore denied.

MARY P. BRANCH, APPELLANT, VS. ALGERNON S. COLE, APPELLEE.

1. A suit in equity claiming dower and mesne profits is not an action for the recovery of real property based upon the seizin or possession of the plaintiff, her ancestor, predecessor or grantor.
2. A suit in equity claiming dower and mesne profits is "an action for relief not hereinbefore provided for," within the meaning of the twelfth section of the act of limitations of this State.

Appeal from the Circuit Court for Leon county.

The facts are stated in the opinion.

J. T. Bernard and *R. B. Hilton* for Appellant.

I. This is not such an action as is meant by section 12th, page 22, act 1872. By reference to said act it will be seen

that from section 25, section 9 inclusive, the limitations therein mentioned refer exclusively to actions relating to real property, the time being limited to seven years, with certain exceptions of disability mentioned in section 9. Section 10 relates to other than actions for real property. Sections 11 to offsets. Section 12 provides that "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action accrued." We contend that this is not such an action as was contemplated by the statute. At the time of the passage of this act, February 22, 1872, the Code of Procedure was in force. An action is therein defined to be "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." Bush, 457. To institute an action then there "must be an adverse claim or interest." What relation does the widow sustain to the heir or feoffee? Her right differs from all other mere rights of action in not being the result of any adverse *jus possessionis* acquired by the heir or feoffee. Ridgway, *et ux.*, vs. McAlpine, 31 Ala., 462. The widow's title to dower is involved with and ***inherent*** in that of the heir or feoffee. The seizin or possesion of either, although for himself, inures also to the benefit of the claimant in dower. Park on Dower, 335, as cited in Ridgway, *et ux.*, vs. McAlpine, 31 Ala., 463. This was not an action, but would be a special proceeding under the definition as given in the code.

II. Section 12 does not refer to actions based on real estate, because every phase relating to any interest in realty had been provided for in section 2 to 8, inclusive. They all refer to an adverse interest as to title or possession, and therefore section 12 can only refer to such actions as are not specified in section 10.

III. But if it can be considered as barring an application for dower, it would not apply in this instance if the operation of the statute is prospective. Dower is a continuation of the husband's estate. Joseph Branch, the husband of appellant, died in 1868, before the passage of the act. Had he died since then it would only (if section 12 applies to dower) have affected the right of appellant. Tooke vs. Hardeman, 7 Geo., 20; Chapman vs. Schroeder, 10 Geo., 321; Ridgway, *et ux.*, vs. McAlpine, 31 Ala., 464.

IV. There can be no limit to an application for dower unless expressly stated in the statute of limitations. In all the *old* and most of the modern authorities the widow is pronounced the favorite of the law, and unless expressly mentioned, the statute of limitation does not run against dower. Ramsey vs. Dozier, Treadw. (S. C.) Court, 112; Mitchel vs. Pages, 1 Not. & M., (S. C.) 85; Burdley vs. Clayton, 5 Harr., (Del.) 154; Ridgway vs. Mc., 31 Ala., 458; Owen vs. Campbell, 32 Ala., 521; Tooke vs. Hardeman, 7 Geo., 20; Parker vs. Clear, 1 Met., (Mass.) 24; Welem vs. Roach, Dudley, (Geo.) 123; May vs. Ramsey, 1 Mich., 1; Barnard vs. Edwards, 4 N. H., 107; Wright vs. Conover, 7 N. J., (2 Hals.) 482; Park on Dower and 4 Kent, 70. See especially authorities in 31 Ala., 458, where the court says: "The reasons upon which these decisions, English and American, have been mainly based are that dower is highly favored; that the right to it is unlike any other right to land; that it differs from all other mere rights of action in not being the result of any adverse *jus possessionis* acquired by the heir of feoffee; that its own distinguishing peculiarities, and the favor to which it has been so long a time entitled by law are sufficient to except and exempt a suit for the assignment and recovery of dower from the operations of all general statutes of limitation, however broad and comprehensive, *which do not expressly name it*

or include it by unavoidable implication." In Iowa a different doctrine is held, (Phares vs. Walters, page 102, 6 Clarke,) but even there Section 1,397 of the Code requires that applications may be made within *ten* years. See Iowa Code. Again, it will be noticed that in nearly all the States where the code has been adopted, the widow is adjudged barred under the general statutes of limitation, but in other States there is a different ruling.

V. From the nature of the widow's interest in the real estate of which her husband was seied during her coverture there can be no limitation to bar her of her right in claiming dower. What is the nature of this interest? It is involved with and inherent in that of heir or feoffee; the seizin or possession of either, although for himself, inures also to the benefit of the claimant in dower. Ridgway vs. McAlpine, 31 Ala., 463. The alienee and widow are somewhat then like tenants in common, "for none knoweth his own severalty." She is considered as being in possession. 10 Geo., 327; 4 Kent, 66. If, then, her position is somewhat analagous to that of a tenant in common she is not barred. Atkinson vs. Atkinson, 37 N. H., 436, and Campbell vs. Campbell, 13 N. H., 483; Burns vs. Byrne, 45 Iowa, 285; Haley vs. Glidden, 10 N. H., 402; Atherton vs. Johnson, 2 N. H., 31.

W. I. Vason and *D. S. Walker, Jr.*, for Appellee.

The decisions have heretofore varied in the different States, but at present it has been decided in all the States where the question has arisen that the action for dower is within the statute, though not specially named therein, provided the language of the statute brings it plainly within the meaning and scope of the statute. Jones vs. Powell, 6 Johns. Ch., 194; Phares vs. Walters, 6 Iowa, 112; 38 Ill., 33.

The only difference being that in some of the States the statute commmences to run—first, from the death of the husband; second, in other States from the date of the demand made by widow; third, and in others, by equitable construction, dower is barred like other actions, if not brought within the time limited for the bringing of other actions.

We shall review a few decisions of each kind.

In Iowa, first in the case of Phares vs. Walters, the only question which the court found it necessary to decide was what was meant in the statute by the words "real property." And they being defined by the laws of Iowa to mean lands, tenements and hereditaments, and all rights thereto and all interests therein, equitable as well as legal, the court decided that the action for dower was clearly included in the statute.

In New York, in James vs. Powell, 6 Johns. Ch., 194, Chancellor Kent said: "That if there had not been a special statute giving the widow the right *at any time during her life* to claim her dower, her action would have been barred like any other action. The general and sweeping language of this act (says the Chancellor), no less than the sound policy of it, would dictate the application of it to the action of dower, as well as any other real action." That portion of the New York statute to which the Chancellor applies the foregoing positive language is in the same words as the second and third sections of our statute. We consider this as the best and most direct and positive authority. Tyler on Eject. & Adv. Poss., 101, 102.

In Kentucky the decisions have been the same. See 10 B. Monroe, 782; Scribner on Dower, 525, 526, 531; also 528, note 5, which shows that like decisions have been made in Pennsylvania. The statute of limitations of New Jersey "applies to the action of dower, and may be pleaded

in equity as well as in law." Conover vs. Wright, 2 Halstead Ch., 613, 616, 617; see also Tuttle vs. Wilson, 10 Ohio, 24; Kingsolning vs. Pierce, 18 B. Monroe, 782; Toney vs. Miner, 1 Smede & Msh., 489.

Second. Where the statute begins to run from date of demand made. See Robin vs. Flanders, 33 N. H. R., 524: Tyler on Eject. and Adv. Poss., 114; Carmichael vs. Carmichael, 5 Humphries, 96.

The course of decision in South Carolina has been to date the running of the statute, not from the accrual of the right, but from the accrual of the right of action for its assertion, so that the statute does not begin to run until there is a possession in some one adverse to the claimant of dower. Angel on Limitations, Sec. 367, page 360: also Scribner on Dower, 540; Richards vs. Tolbert, Rice S. C. Eq. R., 58, 170; Wilson vs. Lanahan, McMullan's S. C. Eq., 35, 37.

Third. Where by equitable construction dower is barred like other actions, if not brought in the time limited for bringing other actions.

In Story's Eq. Jurisp., Sec. 1,520, it is said: "A defence peculiar to courts of equity is that founded upon mere lapse of time and the staleness of the claim in cases where no statute of limitations directly governs the case. In such cases courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by rsfusing to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiesence in the assertion of rights." This is quoted in Scribner on Dower, 531, as entirely applicable to actions for dower; also in Tuttle vs. Wilson, 10 Ohio, 24; Ralls vs. Hughes, 1 Dana Ky., 407; Boyle vs. Roman, 3 Dess. So. Ca., 555.

In 1 Dana it is said that the time when it is proper to

dismiss a claim as stale is usually by analogy to the time limited by law. Scribner on Dower, 532.

In Maine it is held that the equitable as well as the legal presumption is, that dower has been released, if not sued for within the time limited for other real actions under the statute. Dunham vs. Angier, 20 Me., 242, 245. The rule should be the same in Mass. Tyler on Eject. & Adv. Poss., 116.

See also as to when the cause of action for dower commences generally. Scribner on Dower, 541, Sec. 27; Angel on Limitations, 42; Owen vs. Peacock, 38 Ill., 38, 39; Hooper vs. Hooper, 2 Zabriskie, N. J., 715; 18 B. Monroe, 107.

The circumstances of the case at bar make it one of those cases wherein a court of equity will gladly allow a defendant to avail himself of this defence peculiar to its jurisprudence.

The plaintiff knew that Cole had purchased the land under the power of attorney made five years before she married Branch, and she waits for 13 years before she files her bill. The presumption is that Cole gave full value for the land, and that he always thought he bought it unencumbered with any dower rights. Owen vs. Peacock, 38 Ill., 33, 37 and 38.

In those States where dower has been decided not to be in the statute, it has been upon the grounds that the widow did not count on her own seizin, or that of her ancestor, predecessor or grantor. Dunham vs. Angier, 20 Maine, 245.

This reasoning would apply to all the States, for their statutes in this respect are the same, since the accrual of the right under them all depends upon the seizin of the plaintiff, or his ancestor, predecessor or grantor, within the time limited by the statute.

But in all the States where it has been decided that

dower is barred there is a distinction made between the right to enter and the right of action to recover.

And from the policy of the law it has been decided universally that the statute commences to run against dower from the time the widow can assert her right, to-wit: the death of her husband, or from the time she asserts her right and it is denied; though she has not the right to enter, because she does not count on her own seizin, or that of her ancestor, &c., yet she has the right to bring her action to recover real estate, and she must bring that action within the time limited for other real actions, after that right accrues, or the presumption will be that she has released her right.

In Mr. Tyler's late work on Ejectment and Adv Poss., "the statutory policy of the several States in respect to the action for the recovery of real property" is set forth in full. The 12th section was expressly included in our statute for the purpose of barring every imaginable action, suit, claim or demand known to the law, by which relief could be asked.

There is no force in the reasoning that dower is favored in law, when applied to such questions as are presented in this case. In Owen vs. Peacock, 38 Ill., 33, 37, when the question before the court was the same as the one here under consideration, the court said: "Although dower is favored in law, yet there is nothing so peculiar in the right as to give it special immunity over all other rights to real estate, when a remedy is sought to enforce the right."

In England, where dower originated, and is favored more than anywhere else, it is barred by the statute of non-claim, unless brought within five years after the widow is deforced. And deforcement in England is exactly the same thing as the non-compliance of the representative of an estate in setting aside dower under Chap. 380, ec. 1, Laws of Florida. 3 Black., 173; Parker vs. Obear, 7 Met., 30.

In Alabama, where much is said about the favor which should be shown dower, the statute bars its recovery, unless brought in three years, while other real actions are limited to twenty years.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a bill in equity to assign dower and for damages for mesne profits.

Pleas were interposed under the second and fourth sections of the act prescribing limitations to civil suits in this State, (Chap. 1869, Laws,) as well under the 12th section of the same act. These pleas, properly framed to raise the question desired, were set down for hearing; the first plea under the second and fourth sections of the act was overruled, and the second plea under the twelfth section was sustained.

Section 2 of the act provides that no action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within seven years before the commencement of such action. The 4th section provides that presumption of possession shall follow the legal title, to be overcome only by proof of adverse possession.

In the case of Wade vs. Doyle, 17 Fla., 522, we had occasion to interpret sections two and four of this act. We there held that a plea simply denying the seizin or possession was not sufficient, but it must be averred that the possession was adverse.

We think it clear that the second section of the statute does not embrace this case, because that section must by its terms be confined to cases where the plaintiff's right in the "action for the recovery of real property is sought to be maintained upon the seizin or possession of the plaintiff.

his ancestor, predecessor or grantor." A dowress seeking an assignment of dower, and the possession of the land assigned, does not claim by virtue of the seizin or possession of herself, or of any of her ancestors, predecessors or grantors. She claims by virtue of the seizin and possession of her husband. 1 Selden, 394; 4 Kent, 69. We presume this will not be questioned, as the definition of dower by all text writers, and its character as fixed by our statute, refers it to the seizin and possession of the husband. We next inquire, is the husband the ancestor, predecessor or grantor of the wife. He is certainly neither her ancestor nor grantor. Is he her predecessor?

We find very little in the books by which upon authority we can define this term predecessor as here used.

In Brooks Reading upon the statute, (32 Hen. VIII., Ch. 2, from note to §367, Angell on Limitations,) it is said: "'A woman brought a writ of dower of the seizin of her husband sixty-one years past, the action lyeth *because* that is not of her own seizin, nor of none of her ancestors nor predecessors, neither is it an action possessory, and is not prohibited by the statute."

It must, however, be plain that the date of the seizin or possession of the husband cannot in the very nature of things be the commencement of the limtiation. The husband may sell land twenty years before his death, and at no time up to his death can a right of action accrue to his wife, and yet with this construction, without any fault on her part, she would be divested of her right. The statute was intended to bar only those who being entitled to bring actions neglected to bring them.

In speaking of a statute much more comprehensive than the second section of the act of February 27, 1872, of this State, the Supreme Court of Massachusetts, in Parker vs. Obear, 7 Met., 27, say: "That it applies to those cases

and those only where a right of entry existed in the party claiming the estate, or in the ancestor or predecessor of the person who claims the land," and a party claiming dower, it is to be inferred from the opinion, is not embraced in these terms.

For the reasons stated we do not think that this suit in equity is embraced in the second and fourth sections of the act of limitations.

Is it embraced in section 12? That section provides that an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

The plea here is an adverse possession for twelve years before this action was commenced, and that twelve years have elapsed between the accrual of the right of action and the bringing of this action. Upon this adverse possession, after the death of the husband, a cause of action accrued to the party entitled to dower, and if this suit in equity is an action for relief within the meaning of this section, then it is barred by it. This statute was passed during the time in which the code was in force in this State, and the legislative intent and the scope and effect of this section must be controlled by this fact. In section 252 of the code such a proceeding "brought to recover dower, before admeasurement, of real property aliened by the husband" is called an action. The proceeding is not a special proceeding for the assignment of dower under the provisions of the act of November 7, 1828. Thomp. Dig., 186. We very much question the legality of placing a person claiming dower in possession of lands held adversely as set forth in this plea under that proceeding. But however that may be, this is a suit in chancery claiming dower in lands and mesne profits, and under the code the appropriate method to assert such a right was a civil action through a complaint. The decree is affirmed.

ELIZA N. SHEAR, APPELLANT, VS. WILLIAM L. ROBINSON, APPELLEE.

1. When a married woman has appeared before a magistrate, having signed a deed and acknowledged it, and he certifies a full compliance with the statute, his certificate, except fraud be shown, must be held conclusive of the facts it asserts. (Agreeing with Hart vs. L'Engle *et al.*, January Term, 1881.)

2. A conveyance of land and other property in form, an absolute deed of bargain and sale in consideration of an indebtedness secured by a prior mortgage, (held by the grantee, who is in possession under a lease), and of subsequent advances, said deed being executed under circumstances inducing the grantor to believe that it is intended as a security for the money named as the consideration, and the prior mortgage being foreclosed by the grantee for the entire amount named as the consideration of the deed, the mortgagor, a married woman, consenting thereto, and the prayer of the bill asking for a decree of sale, and that the proceeds of the sale be applied to pay the complainant the amount of money named as the consideration of the deed and interest thereon, and the surplus, if any, to be paid to the grantors—such deed will be deemed a mortgage.

3. A decree procured by the complainant under such foreclosure proceedings, which provides that the surplus on a sale of the premises, after paying the amount named in the deed of conveyance, is to be paid to the grantor or mortgagor, is not only substantial evidence of the character of the deed as a security only, but is a judicial demonstration thereof.

4. Where a mortgagee bid in property for a much larger sum than the amount due by the decree of sale, under the advice of counsel that he would not be required to pay over any surplus to the mortgagor, and being advised that he is entitled to retain such surplus because he is already the owner of the property so sold, he is not entitled to be relieved from his bid on the alleged ground that he acted under a mistake of fact, the mistake alleged being purely one of law and not of fact.

5. A purchaser is not entitled to be relieved of his bid under such circumstances upon the additional ground that the property is worth much less than he had bid, especially when another responsible bidder offered $7,900 and the purchaser bid $8,000.

6. A paper purporting to be a release of the complainant from the ef-

fects of his first bid at a mortgage sale, signed by the mortgagors, (a married woman and her invalid husband,) and releasing the purchaser from paying over the surplus, to which the mortgagors are entitled by the decree of sale, the assent to such paper having been obtained by the complainant by imposing upon their weakness and confidence in the absence of counsel or advice, is of no effect to curtail or control their legal or equitable rights so sought to be affected.

Appeal from the Circuit Court for Leon county.

The case was decided by Hon. John A. Henderson as Referee, to whom it was referred by consent of parties. L. N. Shear died after the appeal was taken, and the case proceeded in Mrs. Shear's name, he having been a defendant in her right.

On the first day of August, 1877, Eliza E. Shear and L. N. Shear, her husband, executed a mortgage to Robinson upon her separate property to secure a promissory note of $1,590 of that date, due one day after date, and further advances to be made by Robinson in money, provisions and supplies; the amount of the mortgage security being limited to $2,000. The property included in the mortgage consisted of a plantation of some 957 acres of land, with the improvements thereon, and a large quantity of personal property, including household furniture, ornaments, pictures, books, carriages, harnesses, &c.

On the same day of the date of the mortgage, Mrs. Shear and her husband executed and delivered to Robinson a lease of the said plantation and personal property for the term of five years, and until the first of January following, at the annual rent of three thousand pounds of lint cotton, from which rent Robinson might deduct the taxes upon the property if he should pay them. Robinson was put into the immediate possession of the property by the terms of the lease.

On the seventh day of Janaury, 1878, Robinson filed his bill of foreclosure against said mortgagors, alleging "that

on the first day of August, 1877, the defendants then being greatly indebted to various parties by judgments and otherwise, and being greatly distressed for money, applied to your orator for assistance, who agreed to furnish certain sums of money and to make certain advances in aid of said defendants who agreed to execute to your orator a mortgage upon certain real and personal estate in Leon county for said money and advances; that your orator, in pursuance of said agreement, proceeded to make such advances and to assume such indebtedness of defendants, and on the day aforesaid, the defendants being then indebted to your orator in the sum of $1,590, and your orator having agreed to assume certain other indebtedness of defendants, and to make further advances, which have since been made, amounting to the further sum of $1,746.91, the defendants on that day executed in due form of law a mortgage to your orator to secure the first-named sum of money, which was due by a promissory note of defendants for that amount ; * * * that the defendants have never repaid any part of the said indebtedness, and that the whole amount is now justly due ; * * * that said defendants are unable to cultivate said lands conveyed in said mortgage, and unable to make it available as a source of income, or to pay the taxes thereon, or to keep the same in repair, so that the security for your orator's debt is becoming daily of less value ; so that a sale of the said property is necessary for the raising of the money now due by said defendants to your orator, and which they have wholly neglected to pay, and, as your orator alleges, are wholly unable to pay. Wherefore, in tender consideration of the premises, your orator prays that your honor will grant unto your orator a suitable decree of foreclosure of said mortgage, forever barring and foreclosing the said defendants and all persons claiming by, through or under them of all right, title, in-

terest or equity of redemption in and to said mortgaged premises and property; * * * that youe honor will render a decree in favor of your orator, against said defendants, for said amount, and that your orator may have execution thereon as in other cases, and that said property be sold by said master under the directions of this court, and that the proceeds of said sale be applied, first, to the payment of the costs of this proceeding, and then to the payment of the principal and interest of your orator's claim, and the balance, if any, be paid by said master over to defendant, Eliza E. Shear, to her sole and separate use."

These provisions and prayers of the bill are given in its own words. The bill was duly sworn to by complainant January 3, 1878. The defendants, by an endorsement upon the bill, waived service of process January 4, 1878, and on the same day signed an answer confessing all the allegations of the bill, and admit "that the said William L. Robinson has assumed for and advanced to them under said mortgage the sum of thirty-three hundred and thirty-six and ninety-one hundredth-dollars, including note; and that they have never repaid any part of said indebtedness to said William L. Robinson; and that the said amount of $3,336.91-100 is now due and owing to him;" and they therefore consent to a decree of foreclosure as prayed for in said bill of complaint. This answer was filed together with the bill on the seventh day of January, 1878. On the 31st of January, 1878, a decree of foreclosure was rendered upon said bill and answer, and it was "ordered, adjudged and decreed that the said complainant do have and recover from the defendants the sum of three thousand three hundred and thirty-six dollars and ninety-one cents for amounts advanced and assumed by said complainant for and on account of said defendants; and the mortgaged property, real and personal, was ordered to be sold, and that the "proceeds of the sale

be applied, first, to the payment of the costs and expenses of these proceedings, and the remainder toward the payment and satisfaction of the said sum of three thousand three hundred and thirty-six dollars and ninety-one cents and interest from the date of this decree; and if there shall not be enough for that purrpose that an execution do issue against said Eliza E. Shear and LeRoy N. Shear for any balance that may remain after applying said proceeds, to be levied as other executions at law. And it is further ordered that should there be a surplus over and above the said sum of $3,336.91-100, together with interest and costs of court, after such sale as aforesaid, then it shall be the duty of the said master to turn over said surplus to the defendants, Eliza E. Shear and LeRoy N. Shear."

In pursuance of this decree the master sold the property in June, 1878, for the sum of $8,000, to the complainant as the highest bidder, and the master reports that "Robinson, the purchaser of said property, declines to receive a deed or to pay to the master the amount of said bid after deducting the amount of the decree," but makes a statement, which is submitted to the court by the master. The substance of this "statement" was afterwards bodied in a petition to the court. praying that the master be directed to make a deed to him without requiring the payment of any money except the costs; or that the sale be declared void and set aside and petitioner released from his bid. This petition, being entitled of this cause, is as follows:

To the Hon. P. W. White, Judge:

Your petitioner, William L. Robinson, respectfully represents unto your honor that he is the complainant in the above entitled cause; that on the first Monday in June, A. D. 1878, W. K. Beard, master in said cause, by virtue of a decree therein offered, for sale certain real estate and personal property in said decree mentioned, and the same was

knocked off to your petitioner for the sum of eight thousand dollars; that the circumstances and impressions under which your petitioner bid on said property were as hereinafter set forth; that in August, 1877, the defendants executed to your petitioner a lease of the real estate described in said decree for the period of five years from January 1st, 1878, and on or about the same day in August the said defendants executed to your petitioner a mortgage of all their interest in said real estate and personal property described in said decree to secure indebtedness of the said Eliza E. Shear to your petitioner; that a suit was instituted in the above named court on or about the 4th day of January, A. D. 1878, to foreclose said mortgage, and on the same day the said defendants answered, confessing the facts stated in the bill of complaint; and on the same day your petitioner became the purchaser of all the right, title and interest of said defendants in the said real estate and personal property, and the same was conveyed to him in fee simple absolute; that your petition then paid to said defendants $500 in cash, which, with the said mortgage and other indebtedness, was the agreed price for said real estate and personal property that your petitioner was advised by counsel that, although he had become the owner of the entire estate by said purchase, for which he paid the full value, it would place his title in a clearer and better apparent condition to continue the foreclosure suit and have a decree and sale. Relying upon such advice your petitioner caused said suit to be prosecuted to a final decree, and on the 31st day of January, 1878, such decree was entered, although he had previously become the entire owner of the property as aforesaid; and relying still further upon the advice of counsel, he caused the property to be advertised for sale, and just before the sale was advised by counsel that it would not at all complicate your petitioner to bid on said property at

said sale to any amount over and above the decree, and that he would not have to pay any money on such bid; that your petitioner, relying upon such advice, and the property having been run up by a bidder who, as he now believes and then believed, was bidding for the purpose merely of annoying him, your petitioner did bid as high as $8,000 for the same, and it was knocked off to him; that after said sale your petitioner learned, with great surprise, that there is a provision in the decree that the balance of the money, over and above the amount of the decree and costs, should be paid to the defendant, when, in fact, he has, since January 4, 1878, been the owner of the entire property; that no bid over the amount of the decree and costs would have been made by your petitioner had he not been misinformed and misled as to what the terms of the decree were, and the possible state of complication which might result to him; nor would he have offered such property for sale under such decree if he had not thought and believed that he could, with impunity, have bid any amount without having to pay any money as aforesaid other than the costs, and that said property belonged to him; that under these circumstances your petitioner directed a communication to W. K. Beard, the master, setting forth these facts substantially as herein stated, and refused to take a conveyance or to pay any money except the costs; that after said sale, and as soon as the defendants were apprised of the facts as above set forth, they executed to your petitioner an instrument under their hands and seals setting forth the facts of the case, the mortgage and the sale to your petitioner of said property, and that the foreclosure of said mortgage was made on the advice of counsel, although they had fully and for full and valid consideration received sold to your petitioner all their interest in said property, and that said decree directing the payment of the balance of the purchase-

money, if any, was contrary to the rights of said parties, and by said instrument they relinquished all claim to said balance, after reciting the facts of the foreclosure and sale and the bid of your petitioner, and they thereby consent that the said sale be set aside, or that the master execute to your petitioner a deed to said property without requiring the payment of any money except the costs of such foreclosure, suit and sale; that soon after the execution of the deed to your petitioner he signed a paper stating that he would sell to Mrs. Shear the plantation and household furniture as it then stood, which she and her husband had previously conveyed to him, for the sum of thirty-three hundred and thirty-six dollars, and full value for any improvements and all expenses of said plantation incurred in improvements or connected therewith, with interest at the rate of eighteen per cent. upon the sums of money so expended up to the date of such sale, if made to her; that afterwards the original of this agreement was destroyed by agreement of the parties, and the same was renewed. Your petitioner therefore prays your honor that the master, W. K. Beard, may be directed to make a deed to all of said property so sold by your petitioner without requiring the payment of any money except the costs of the suit and of said sale, or that said sale may be ordered by your honor to be set aside and declared void, and your petitioner released from his said bid. And may it please your honor to grant unto your petitioner such other and further relief as may seem meet, just and equitable in the premises.

And your petitioner will ever pray, &c.

GEO P. RANEY,
J. T. BERNARD,
Attorneys for Petitioner.

Mr. Raney had not been connected with the case until after the foreclosure sale, from which relief is sought.

The defendants filed an answer to said petition on oath as follows:

Sworn to by Mrs. Eliza E. Shear.

Now come the defendants by their attorneys, David S. Walker, Jr., and E. M. Hopkins, and in answer to the allegations set forth in the petition of William L. Robinson, filed in this cause, say: That true it is, as alleged in said petition, that said plaintiff bid eight thousand dollars for the property of these defendants, which was sold by the said master on the first Monday in June, 1878, under a decree of foreclosure in favor of the said plaintiff, against these defendants, for $3,336.91-100, and that the said property was knocked down and sold to the said plaintiff at the said sum of eight thousand dollars.

2. And that it is also true, as alleged by said plaintiff, that these defendants on the first day of August, 1877, executed a lease of their plantation to the said plaintiff for five years, and also a mortgage on said plantation and personal property on the same day, said mortgage being a security for the payment of fifteen hundred and ninety dollars and advances to be made by the plaintiff to these defendants, not to exceed two thousand dollars, but that these two instruments of writing were but one contract, and were so considered at the time they were executed by all parties thereto, both being signed at one and the same time, and it being considered that a violation of any of the provisions of one of them would be a violation of the other; that is to say, that they related to each other, and were, both taken together, an entire contract.

3. That it is also true that on or about the 10th of January, 1878, these defendants did sign an answer to the bill filed against them by the plaintiff, confessing the allegations set forth in the said bill, but that it is wholly untrue that the said plaintiff did, on the 4th day of January, 1878,

or at any other time, become the purchaser of all the right, title and interest of these defendants in the said real and personal property, or that these defendants ever conveyed to him, in fee simple, absolute, their or either of their interest in said real and personal property. It is true that these defendants did, on or about the 10th day of January, 1878, execute an instrument of writing to the said plaintiff for the purpose of securing the amount of money then claimed by the said plaintiff to be due under the said mortgage, to-wit: the said $1,590, and $1,246.90 advances already made under the said mortgage, and also five hundred dollars additional thereto then and there advanced to these defendants; and that said plaintiff never until now has claimed that, by virtue of said instrument of writing, he was the purchaser of the fee simple, absolute, of said property.

4. That under the said mortgage the plaintiff agreed, in consideration of the premises therein mentioned, to advance to the defendants two thousand dollars in money, provisions, supplies, &c., but that after advancing to them only $1,246.91-100 he refused to make any more advances without further security, and on the 4th day of January, 1878, commenced proceedings to foreclose the said mortgage; that the said $3,336.91-100, the amount of the decree rendered in pursuance of the prayer of said bill, was taken together, the amount of the said note for $1,590 and $1,746.-91-100, claimed by the plaintiff to have been advanced to these defendants, including the said sum of five hundred dollars paid to them at the time of executing the pretended deed, on or about the 10th day of January, 1878; and that it is this same amount of $3,336.91.100, and identically the same money that is stated as the consideration of the pretended deed; that is, the said pretended deed was made for the purpose of securing the said sum of $1,590 and $1,-

746.91-100 of advances, which had been made from the date of the mortgage up to the date of the pretended deed. The only difference between the consideration of the mortgage and the consideration of the pretended deed being that the mortgage was given to secure the $1,590 and $2,000 *to be advanced*, and the pretended deed being to secure the said $1,590 and $1,746.91-100, the latter amount being that portion of the said two thousand dollars then claimed to have been actually advanced; that at the time these defendants executed the pretended deed the plaintiff had their confession of the allegations set forth in the bill which claimed from these defendants $3,336.91-100, which was five hundred dollars more than these defendants then owed the said plaintiff, and that the said plaintiff paid to them this amount to make out the said sum of $3,336.91-100; that these defendants received no consideration whatever for executing the said pretended deed since it was already their right under the mortgage to have the said five hundred dollars advanced to them, and the plaintiff already had their confession of judgment for the same, and, in justice under the mortgage, they had a right to receive from the plaintiff to his counsel, that he was already the owner of the $1,746.91-100 he had already advanced, since it would require that much to make the full amount of two thousand dollars, the amount promised by the plaintiff to be advanced under the mortgage; that it is probably true that plaintiff's counsel advised him that it would place his title in a clearer and better apparent condition to foreclose the mortgage and purchase the property, for certainly such advice was correct and good law, as plaintiff had no title and could not obtain one otherwise. But if true, as alleged, that plaintiff's counsel advised him that he would not have to pay these defendants the amount he should bid off for after deducting the amount due by these defendants to him, such

advice was give upon the false representations of said plaintiff to his counsel, that he was already the owner of the fee simple title to the said property; and that even if such advice was given by counsel with a full knowledge of the facts, it would not relieve the plaintiff from the obligation of paying the purchase-money.

6. That plaintiff's allegation that the said R. S. Williams, who bid $7,900 at said sale, bid said amount for the purpose of annoying said plaintiff and causing him expense, is entirely untrue, the fact being that the said Williams bid said amount with the intention of buying, and was ready, able and willing to pay said amount had the property been knocked down and sold to him; that it is untrue that the said property is not worth more than $3,336.91-100, and that the true value of the real estate with improvements is about $13,000, these defendants having paid therefor, in 1870, on the 23d day of April, ($11,920) eleven thousand nine hundred and twenty dollars, and on the 17th day of February, 1871, one thousand dollars more, making in all ($12,920) twelve thousand nine hundred and twenty dollars, as shown by the deeds of Eliza Williams and Joseph John Williams, her husband, to Eliza E. Shear, one of these defendants, recorded in the clerk's office of Leon county, book P., pages 359 and 617, and that the lowest estimate of the worth of the personal property is ten thousand dollars.

Defendant further says that the said pretended deed of January, 1878, was given not only utterly without legal and valid consideration as aforesaid, but that it was obtained from these defendants by an oppressive and fraudulent use of the mortgage, which the said Robinson had already obtained from these defendants, and by the false and fraudulent contrivances of the said Robinson and one Cora VanNess, the sister of the said Eliza E. Shear, by the aid of the said mortgage; that after the said mortgage was

given these defendants no longer had control of their own affairs; that the said Robinson claimed that all their property was under his control, and that he took and held possession of all their said property, thereby rendering it utterly impossible for either of these defendants to obtain the means of living except through the said Robinson, and that they were utterly dependent upon him for support; that he and the said Cora VanNess, by false and fraudulent representations, induced the said Eliza E. Shear to leave Tallahassee, where they were then living, and go into the country, the said Robinson refusing to advance any more to the said defendants unless they would go into the country, where, they finally being persuaded by said false representations and threats of the said parties, concluded to go, and did go on or about the 30th day of August, 1877; that having gone into the country they were literally and absolutely at the mercy of the said Robinson and his co-conspirator, Cora VanNess. Having no means whatever, and no friends to whom they could apply for advice and assistance, that it was from absolute necessity, in order to procure means to live and be able to remove from the country, where they were subjected to the most cruel surveilance and constraint of the said Cora VanNess, and from the absolute impossibility of getting subsistence from any one else than the said Robinson, that induced them to execute the said pretended deed; that being absolutely in the power of the said Robinson, unable to live without his assistance, and virtually imprisoned in a sequestered place in the country, seven miles from Tallahassee, without the means of leaving said place without walking, unless by the consent and order of the said Robinson, and watched by the said Cora VanNess, the said defendant, LeRoy N. Shear, being reduced to a state of perfect helplessness of body in consequence of deprivation and sickness, and the said defendant being utterly

dependent upon her own exertions, and reduced to a perfect state of distress, both of mind and body. these defendants found it impossible to avoid the temptation of signing said paper with the inducement offered them of ($500) five hundred dollars, with which they would be able to provide for their immediate necessities and leave the place where they were enduring so much suffering; that it was understood at the time of the execution of said paper that it was intended as a security for the money already advanced by the said Robinson to these defendants, and the said five hundred dollars advanced to them at the time of the execution of said paper, and that the said Robinson gave to these defendants a written paper at the time the said pretended deed was executed for the purpose of showing that the said deed was intended for that purpose.

Defendants further allege that the said Eliza E. Shear did not acknowledge on the 4th day of January, 1878, or at any other time, upon a separate or private examination, separate and apart from her said husband, L. N. Shear, before a Justice of the Peace, or any other officer or person appointed by law to take such acknowledgement, that she executed the said deed, bearing date January 4, 1878, freely and without any fear of compulsion from her said husband; that the only acknowledgement she made to or before any such officer or person was before J. D. Pepper, a Justice of the Peace, in the presence of her said husband, in reply to the said Pepper, who asked her if she acknowledged the execution of said deed, or words to that effect; that the said deed, and everything connected therewith, that she ever did was at one and the same time, in the presence of Mr. Malambre, Mr. Lester and Mr. J. D. Pepper and her husband, while they were all very near together, in the same room, and at the same table, and that she never was separately and apart from her husband examined by the

said Pepper, or any other officer or person, as to her execution of said pretended deed, having had no conversation with the said Pepper except that referred to in the presence of her said husband, Lester and Malambre.

Defendants further say that it is untrue as represented by the said Robinson in his said petition that these defendants, as soon as they were apprised of the facts set forth in said petition, executed to him the said instrument therein spoken of; on the contrary, the facts as set forth in said petition were never stated to these defendants by the said Robinson, and if they had been so stated these defendants could never have been induced by such a statement of facts as these to sign said paper; that the truth in regard to the execution of the paper referred to by said petition is that these defendants were informed by a letter from D. S. Walker, Jr., and E. M. Hopkins, in Tallahassee, of the sale of said property and the price for which it was sold, and that Robinson was the purchaser; and these defendants, knowing their rights in the premises, provided the sale was a legal and fair one, to the balance of the purchase-money after paying Robinson the amount of his decree of foreclosure, requested the said Walker and Hopkins, by a letter dated the 9th day of June, 1878, to represent their rights in the premises; that about the 14th day of June, 1878, the said Robinson came to the house of these defendants, at Cedar Key, Florida, and represented to them that the Hon. P. W. White, Judge of this court, had passed upon the rights of these defendants in the premises and decided that they had no just claims against the said Robinson. Robinson also stated that these defendants had been imposed upon by D. S. Walker, Jr., E. M. Hopkins and R. S. Williams by fraudulent representations in order to get the use of their names for the purpose of making money out of him, the said Robinson; and that the said Walker & Hop-

kins and Williams were endeavoring to black-mail him, and that it would be in the highest degree dishonorable for these defendauts to allow the said Walker & Hopkins to proceed further, and for defendants to refuse to sign said paper. He also stated that the whole thing was a conspiracy on the part of the said Walker, Hopkins and Williams to defraud him. He stated to these defendants that unless said sale was set aside, certain creditors of theirs, whom the said Robinson had agreed to pay and had a mortgage against these defendants to secure him for so doing, would have a right to collect their money out of these defendants, and that they would be after these defendants like a pack of sharks.

Defendants further say that Robinson brought with him the said paper already written, and said that Hon. J. T. Bernard, in whom these defendants had the utmost confidence, had prepared it, and said that these defendants ought in honor to sign it. Robinson also showed to these defendants another paper purporting to be an opinion of the Hon. Geo. P. Raney, for whose legal opinion these defendants entertained the highest estimation, to the effect that these defendants had no rights in the premises; and these defendants, becoming convinced from the fraudulent representation of the said Robinson that the sale was illegal and fraudulent, and that it would be dishonorable to hold the said Robinson to it, they executed the said paper, understanding that said paper amounted to nothing more than an acknowledgement that they had no right to claim the balance of the purchase-money which the said Robinson had bid at said sale of the said property, because said sale was an illegal and fraudulent one; that the said paper was a very long one, and that they signed it without advice from any one; that they did not read said paper, but that the said Robinson pretended to read it to them; that he

did not read that portion of the said paper which stated that the master was authorized to make deeds to the said Robinson; that they did not know when they signed said paper that it contained any such provision, and that what else of said paper that was read to them by said Robinson they considered to be simply an acknowledgement of the execution of said deed of conveyance made by these defendants to the said Robinson in January, 1878, which was meant to operate as a security of $3,336.91-100, which the said Robinson claimed to be due to him from these defendants; and that said paper was to be construed and understood in all of its provisions by the said conveyance executed as aforesaid in June, 1877; that is to say, that the nature of the papers were the same, and that the terms of sale and conveyance used in said papers were to be taken to mean the same,and to have the same in force and effect as they had in the said conveyance of January, 1878; that the last mentioned conveyance being under the laws of Florida a mortgage, so the said paper referred to in the petition, as to its reference thereto, was intended to speak in the same language as to its legal effect, the one paper merely following the other and being construed by the other, and that such paper was executed without any consideration.

Defendants further say that the said paper mentioned in said petition, which said Robinson says was given by him to these defendants, stating that he would sell the property to Mrs. E. E. Shear, was in fact executed by said Robinson at the same time the said pretended deed was signed by these defendants, and that it was explicitly and perfectly understood and agreed by the said Robinson and these defendants that said paper should operate as a defeasance of said conveyance, and be evidence over the said Robinson's own signature; that the said conveyance was made for the purpose of securing the payment of $3.336.91-100, the con-

sideration mentioned in said deed, and the said paper was not destroyed by consent of all parties, but that the said Robinson fraudulently destroyed the said paper while at these defendants' house in Cedar Key on the occasion referred to, after he had pretended to make a true copy thereof at the request of these defendants.

To this answer petitioner made the following reply:

The petitioner, Robinson, replying to the answer of defendants to his petition to set aside the sale, says:

1. That the mortgage of August 1, 1877, was made to secure the note for $1,590 and such an amount of advances as, with said note, would or might amount to $2,000, and not to secure any other or greater amount; that such was the contract between the parties, and petitioner denies each and every statement to the contrary hereof made in said answer.

2. Petitioner denies each and every statement in said answer alleging or pretending that the said mortgage and the lease thereon referred to were one contract, or considered or made as one contract, but says they were separate and distinct contracts.

3. Petitioner says that the answer to the bill of complaint mentioned in said answer was signed on the 4th day of January, 1878, and not on the 10th day of January, A. D. 1878.

4. Petitioner denies each and every statement made in said answer to said petition alleging or pretending that said deed of January 4, 1878, claimed in said petition to have been executed and made and intended as security or mortgage, and not as a conveyance in fee simple, absolute, of the property covered thereby.

5. Petitioner further says that said deed, claimed by him to be a deed in fee simple, absolute, was made and executed

on the 4th day of January, 1878. Petitioner further says that all sums advanced and advances made by him, over and above $2,000, (including the said note for $1,590 aforesaid,) were not in fact covered by the security of the original mortgage agreement, and one of the reasons why petitioner refused to make any further advances, after having advanced the sum of $1,246,91-00 in addition to said note, was that he found that he had already advanced beyond such mortgage security, and had no security in fact for the same over and above an amount which, with said $1,590 and interest,would be equal to the sum of $2,00. Defendant denies that said sum of $500 was a loan or advance to defendants, but says it was a cash payment made under the agreement to sell said property in fee simple. And defendant denies each and every statement in said answer, and particularly in the fourth paragraph thereof, inconsistent herewith; and further denies each and all the allegations made in said fourth paragraph of said answer.

6. Petitioner denies each and every allegation in said answer intimating that he made any false representations to his counsel.

7. Petitioner denies the sixth paragraph of the said answer, and the allegations in the seventh paragraph of said answer as to the value of the real estate.

8. Petitioner denies each and all the allegations made in said answer charging that said deed was given without legal and valid consideration, and says the contrary thereof is true; and denies that the said deed was obtained by an oppressive and fraudulent use of said mortgage, or by false and fraudulent contrivance of petitioner and the said Cora VanNess. Defendant denies that he ever took or claimed to have control of possession of any property of defendants, or either of them, illegally, or except under and by virtue of said lease or deed, and says that his possession

of the property covered by them was taken with the consent of defendants and in accordance with the meaning and intention of said instrument. Petitioner denies that he and said Cora VanNess, by false and fraudulent representations, induced said E. E. Shear to leave Tallahassee and go into the country, and says if said Cora VanNess did so (which he denies) he was not concerned in or a party to it. Petitioner denies that he ever refused to make more advances unless they would go into the country, or ever persuaded them by false representations or otherwise to go into the country. Petitioner may have advised them that it was better for them to go into the country. Petitioner says said deed was the free and voluntary act of the defendants, and denies each and every allegation to the contrary made in said answers, in so far as he or the said Cora VanNess are concerned, or has or ever had any knowledge or information, and denies each and every allegation in said answer attributing to him in any manner any improper influence, or the use of any improper means, or the taking advantage of any necessities or suffering, or suffering conditions of the defendants, in the matter of said deed or contract of sale; but says it was an open, fair contract, and he never heard any dissatisfaction with the same expressed or intimated until after the first Monday in June, A. D. 1878. Petitioner denies all that is stated between the word "that," in 9th line of 10th page, and the word "paper," on the next to the last line of the 11th page.

9. Petitioner denies that he gave any paper to defendants for the purpose of showing that said deed was intended as a security, and says that the only paper given by the said Robinson to them, or either of them, was the one mentioned in the petition agreeing to sell said property back to Mrs. E. E. Shear, and that this was not given till after said deed had been executed, and was not a part of

the original agreement of sale, but was proposed, agreed upon and executed several days after the execution of the deed, and on the 10th day of January, A. D. 1878.

Petitioner says said deed was executed by said E. E. Shear freely and voluntarily, and that she did on a separate or private examination, before one J. D. Pepper, a Justice of the Peace, in and for Leon county, Fla., separate and apart from her husband, acknowledge that she executed the same freely, and without any fear or compulsion from her husband, and petitioner denies each and all statements made in said answer to the contrary hereof.

Petitioner further replying to defendants' answer, says that said instrument referred to therein as being executed in Cedar Key in June, 1878, as executed under the circumstances and for the purpose, and in the manner stated in an affidavit of petitioner, filed herewith marked "A," and any and all statements to the contrary thereof are false, and said affidavit is hereby made a part of this reply in so far as it relates to said paper, its meaning, purpose and execution, and the petitioner denies all statements in said answer concerning said paper, its meaning, purpose or execution to the contrary of the statement made in said affidavit.

Petitioner denies everything stated in the answer material to be denied, &c.

After the taking of testimony and filing exhibits an order was made referring the entire matter to the referee for trial and final determination. The referee made a decree which, on December 20, 1879, was duly entered of record, "that the sale be set aside and the complainant be relieved from the liability of his bid," and that complainant recover the costs of this proceeding.

From this decree the defendants appealed.

There were put in evidence before the referee the lease dated August 1, 1877, of the same real and personal prop-

erty embraced in the mortgage of the same date; also a deed dated January 4, 1878, referred to in the foregoing petition and in the answer. The due execution of the same was acknowledged by Mrs. Shear, as appears by the deed, before J. D. Pepper, J. P., on the same 4th of January on which the answer to the foreclosure bill was signed and sworn to before the same Justice. The deed recites the execution of the mortgage of August 1, 1877, and proceeds: "And whereas, the said E. E. Shear and L. N. Shear are unable to comply with the terms of said mortgage, or to pay the said sum of money secured thereby, and they being willing and anxious to secure said payments, now this indenture, executed this the fourth day of January, 1878, between the said Eliza E. Shear and LeRoy N. Shear, her husband, of the first part, and William L. Robinson of the second part, all of said county and State, witnesseth that the parties of the first part, for and in consideration of the premises, and the said sum now due by said mortgage, and the further consideration of $1,746.91 paid by the said William L. Robinson to the said Eliza E. Shear and LeRoy N. Shear, the receipt of which is hereby acknowledged, they, the parties of the first part, have bargained, sold, aliened, confirmed and conveyed unto the party of the second part all the following described real and personal property," &c., followed by a description of the property and full covenants of warranty of title.

The following is a copy of an agreement written by Robinson, which Mrs. Shear testifies was executed and delivered on the same day, January 4, 1878, and which Robinson says was not executed until the 10th, some days after:

"GLENWOOD PLANTATION, January 10, 1878.

"I hereby agree to sell to Mrs. L. N. Shear my Glenwood plantation and household furniture as it now stands for the

sum of thirty-three hundred and thirty-six dollars, and full value for any improvements and all expenses of said plantation incurred in improvements or connected therewith, with interest at the rate of eighteen per cent. upon the sum of money so expended, up to the date of such sale, if made to them. W. L. ROBINSON."

Mrs. Shear testifies that the original was destroyed by Robinson in June, 1878, at Cedar Key, and that he copied or rewrote the above at the time, and that this is not an exact copy; that the rate of interest was sixteen nad not eighteen per cent. in the original.

There was in evidence a paper executed by Mrs. E. E. Shear and L. N. Shear at Cedar Key, and acknowledged by her before a J. P. June 14, 1878, (referred to in the answer of Mrs. Shear) as follows:

STATE OF FLORIDA, }
Levy County. }

Whereas, we, Eliza E. Shear and LeRoy N. Shear, her husband, both of said county and State, did on the first day of August, A. D. 1877, execute to W. L. Robinson, of Leon county, Florida, a lease of the lands in Leon county aforesaid, purchased from Eliza and Joseph John Williams, of Leon county, said lease being for the period commencing August 1, 1877, and extending up to five years from January 1, 1878, said lands being more fully described in said lease; and whereas, in consideration of and to secure indebtedness to the said Robinson, we did mortgage said lands and certain personal property therein described to said Robinson, the said mortgage bearing date August 1, A. D. 1877; and whereas, on the 4th day of January, A. D. 1878, we made answers to a suit instituted in Leon Circuit Court to foreclose said mortgage; and whereas, on said last named day we did by deed sell and convey all our interest in said property of every kind, in fee simple abso-

lute, to said Robinson; and whereas, upon advice of counsel it was deemed advisable that a decree of foreclosure and sale should be rendered in said cause, although we had fully, and for full and valid consideration received, sold to said Robinson all our interest, and that of each of us in said property; and whereas, a decree of foreclosure and sale has been entered in said cause and in said decree dated the 31st day of January, A. D. 1878, it is directed that the balance of purchase-money, if any, over and above the amount payable to Robinson and costs, should be paid to said Eliza E. Shear, which was contrary to the rights of said Shear, or either or them, in view of the fact of said purchase by said Robinson; and whereas, said property on the first Monday in June, A. D. 1878, was sold at public outcry; and whereas, said Robinson not knowing it would complicate his position, in case he should bid more than the amount of said decree, principal and interest and costs, did bid the sum of eight thousand dollars for said property, said property having been run up by a party whom Robinson believed to have a desire to annoy him by so running it up, and said Robinson believing that he would not have to pay any bid he might make, however so large, and said property was knocked off to said Robinson at $8,000;

Now, therefore, being desirous that full justice shall be done in the premises, we, and each of us, do hereby consent that the sale so made shall be set aside by the Judge of the Circuit Court of the Second Judicial Circuit of Florida, and that the said decree shall be vacated and set aside, or, in lieu thereof, if the said Robinson shall prefer, we hereby direct the master, W. K. Beard, in said cause to execute a title to said property to said Robinson without requiring him to pay anything except the costs of sale and advertising; and we do hereby forever disclaim having any claim, in law or equity, on said Robinson for said bid, and hereby

forever release him from all and every liability which may have arisen from said decree and sale aforesaid, it being understood that said decree is, in case said Robinson shall take a deed from said master, to stand satisfied, in so far as it decrees anything to be paid to us by said Robinson.

In testimony whereof, we have hereunto set our hands and seals this 14th day of June, A. D. 1878.

ELISA E. SHEAR. [SEAL.]
L. N. SHEAR. [SEAL.]

As to the paper executed at Cedar Key, Robinson says, in his deposition dated August 1, 1878:

Mr. LeRoy N. Shear returned from the North about this time in November, I believe. On one occasion after his return she proposed selling me the place and furniture, saying that the place had been of no profit to them, but a continual source of expense, and that as it was absolutely necessary for them to have some money to go somewhere, and go at something to make a living, that while staying here they were eating up all they had; that by selling then they would have something to go away with, whereas if they remained they would consume everything, and be left here without a dollar among a people who had shown them no sympathy. This was the first time anything about a sale was said or passed between us. I suggested that they had better see Judge Baker, their counsellor, on the subject; that he might be able so see some way out for them, and I furnished conveyance for them to go to Tallahassee to consult Judge Baker. After their coming to Tallahassee to see and consult with him they told me that they knew of nothing better for them to do than sell out entirely and get away from a place where there was no chance for their success in anything they might undertake. After several interviews and talks, in which the whole matter in all its

bearings was thoroughly canvassed, I concluded (and as I then thought more for their benefit than my own, and now I am thoroughly convinced of it.) to buy and offered them five hundred dollars in cash, in addition to the amount they were owing me and I had assumed for them. This they accepted, being, I presume, more than they had reason to expect for such a place and furniture in such condition. They then proposed we should get Judge Baker to draw up a deed absolute to me for the property. There was considerable delay in getting the papers drawn up; as Judge Baker was away from Tallahassee about that time, I suggested that I would get some other lawyer to arrange the matter, but they said they preferred Judge Baker, as they had always employed him; that he was their friend. I of course had no objection to Judge Baker, as I know him to be a lawyer of position and ability. Judge Baker, who had drawn up all the papers in every transaction between us, suggested that as I had already a mortgage it would be as well to foreclose that, in addition to taking the deed in fee simple. The Shears made no objection to this when it was explained to them, and consented to the foreclosure, waived summons, &c., in order to make me as full and perfect conveyance as was possible for them to do; this was their intention and desire. I had no objection because I had every confidence in Judge Baker, and of course followed his directions. The agreement for the foreclosure of the mortgage and the making of the deed was one transaction, and the deed was executed and answer to bill signed at one and the same time, for one and the same purpose, that of making to me the strongest possible title to the property that the law afforded the means of doing—this was expressly understood by both the Shears and myself and Judge Baker. Their consent to the foreclosure of the mortgage was part and parcel of the title they were making to me, and

was so fully understood by them, and no other idea ever entered into their heads so far as I have ever heard until after the sale in June, 1878, the Master in Chancery. Hearing that Mr. Edward Hopkins had written them after the sale that they could make something out of me, I went to Cedar Key to see Mr. and Mrs. Shear. I related to them just what had occurred; that I had bid $8,000 at the foreclose sale for the reason that R. S. Williams run it up on me for the purpose of annoying me. He told me after the sale that I should have paid him one or two hundred dollars to have him stop bidding. This I felt I had no reason to do, as I was bidding on my own property, which was only sold according to agreement to make most perfect titles. When I stated the facts to Mr. and Mrs. Shear they said they had received a letter from Eddie Hopkins, but could not understand it, as they had sold to me all their property, they could not see how they had any claims or interest whatever in the matter, and had so written him, and asking him to explain how they could have any claims. Hopkins' letter is as follows:

TALLAHASSEE, FLA., June 5, 1788.

L. N. Shear, Esq., Dear Sir: The fact that I have represented you in several cases before, and as well as on account of other considerations, suggests to me the propriety of writing to you in regard to the sale of your place, which took place on yesterday, Mr. W. L. Robinson buying it in for $8,000, your personal property being included in the said sale, and all covered by the above amount. Mr. Robinson's entire claim, as I understand it, is only $3,300 and something. If you will give me authority to represent you in the matter I will see if something can't be done in the matter and your interest protected. Please answer this immediately, if you wish me to look after your interest in the matter. As I understand it, there is a surplus over all

incumbrances, which you may be entitled to if I understand it right. I will look into the matter if you desire me to do so.

Both Mr. and Mrs. Shear assured me that our transactions had been of a most satisfactory and honorable character, and that they could and would not do anything to cause me trouble and annoyance about a matter already settled, as we had both intended it, and that even if by an error or quibble or mistake, they were in position to annoy me by an effort to extort money from me, that though poor they were not dishonorable, and could not become parties to any such dishonorable trick. They then showed me E. M. Hopkins' letter, and said I might keep it if I wished. I then told them that I was glad to find that even in adversity they were beyond the temptation of designing people. Mrs. Shear remarked that poverty was a great incentive to do wrong, but that she could not consent to wrong one who had on so many occasions been their friend. I then said you can by joining with Hopkins and Walker give me much trouble; or you can by giving me a paper repeating just what our intentions were, and directing the master make me his deed without the payment of any money, and enable me to close up the matter without trouble. This they both consented to at once, assuring me that it was their earnest desire to carry out fully their contract just as was always understood between us, and to save all the trouble possible; that they would not only sign that paper, but would write immediately to Eddie Hopkins to stop all proceedings; that what he had already done was without authority from them, and that as for Eddie Hopkins' assertion in this letter that he had on several occasions been his lawyer it was untrue, except in so far that he [illegible] Hopkins owed him L. N. Shear one hundred and fifty dollars, and that having exhausted every measure to

try to collect it, being sued by Dr. John S. Bond he let Eddie Hopkins defend him, and that this was the only excuse he (Hopkins) had for claiming to have been lawyer for him in any way. Mrs. Eliza E. Shear then wrote a letter to Mr. Hopkins, which she read to me, and which I saw her put in the post-office. The substance of the letter was:

Mr. Hopkins, Dear Sir: Our, or my, transactions with Mr. W. L. Robinson having been of honorable and satisfactory character, we have no desire to open them. You will, therefore, stop all proceedings. With thanks for the kind interest you manifest in our affairs, I remain, &c.,

E. E. SHEAR.

This letter was read aloud to Mr. Shear and myself. I remarked that it was all right, as it expressed just what she wished. Mr. Shear remarked that it was entirely too courteous, that his (Eddie Hopkins') effort to induce them to become parties to a dishonorable trick deserved a reply which could not be misunderstood.

Since my purchase of the property I have been compelled to expend large sums of money to keep the place from going to ruin. The house was almost in a tumble-down condition; the fence gone, the cisterns out of order, floors rotten, the tin gutters and spout leaking, and the water rotting the timbers, sills, joists, &c., the plastering falling down from leaks in the roof, the window blinds rotten and falling to pieces, in fact the whole place in a state of abandon, dilapidation and ruin, and it still requires the expenditure of a large sum of money to render the place comfortably habitable, and put it in condition to yield enough to pay. Mr. Malambre has spent nearly all his time in repairing furniture and other articles of household necessity about the place, and is even yet not done. After the sale of the property to me in January last, Mr. and Mrs. Shear and family

remained as guests in the house until Mr. Shear's health should become good enough for him to travel and they could determine as to where they would go and what they should do. They remained for a considerable time. Mrs. F. S. Thompson, sister of Mrs. Shear, who lives in the city of New York, came to Florida for the purpose of seeing her sisters and making arrangements for their future, having been informed by Mrs. Shear (that they had sold all their property in Florida, and were about going somewhere to engage in something in which to make a living.)

After mature consideration, much talk and deliberation between Mrs. Thompson and the Shears it was decided that New Orleans was the best place for them, the Shears, to go, and that a newspaper and periodical business the best for them to undertake.

So one Sunday morning they took their departure, destination New Orleans.

The paper executed at Cedar Key was carefully read to Mr. and Mrs. Shear before it was executed, and after the whole matter of the master's sale had been explained. There was no verbal or other agreement proposed or entered into at all, or discussed. I told Mr. and Mrs. Shear that the property had been run up on me by R. S. Williams, as I then and now believe to injure me, and that believing the property to be mine I had bid $8,000 for it as advised by counsel, Judge Bernard, that I could do with impunity, and that I wished them to execute this paper for the purposes therein stated, and that it would be a great wrong upon me if they did not do so, or permitted me to be annoyed upon the suggestions of Mr. E. M. Hopkins. I did tell them that if it was attempted to make me pay the excess of money over the decree it would prevent my compromising outstanding claims against them which I had assumed, and agreed to give them the benefit arising from any compromise I might make.

I never stated that Judge White had passed upon their rights, or decided that they had no claims against me; and never stated that they had been imposed upon by D. S. Walker, Jr., E. M. Hopkins and R. S. Williams by fraudulent representations in order to get the use of their names to make money out of him. I did tell them that they, the Shears, knew that they had sold me the property in fee simple, and I also said to them that I thought that Hopkins and Walker were trying upon the basis of some expression in the deed to influence them to litigate the matter, so that they, Hopkins and Walker, might make some money ont of it. I did tell them that it was Mr. Raney's opinion, from my statement of the case to him, that I had a good case; and I did show them his letter to me containing that opinion. Mr. Raney's opinion filed in the case is as follows:

W. L. Robinson, Esq., Dear Sir: I have examined the deed of January 4, 1878, made by L. N. Shear and wife conveying land in Leon county, Florida, and certain personal property, and it is my opinion that your ownership of such property, particularly under the circumstances detailed by you and Judge Bernard as attending the transaction, can be maintained, and that you can successfully defend yourself against an effort to compel you to pay any *money* on the bid made by you at the sale of said property on the first Monday in June by W. K. Beard, Master in Chancery.

Nothing was said at Cedar Key by Mr. or Mrs. Shear indicating that they had any understanding of the purpose or intent of said paper executed by them at Cedar Key other than its plain language imports. Being perfectly willing, as I still am, that Mrs. Shear should still have the privilege of purchasing back the property granted her by the agreement January 10, 1878, I did, while at Cedar Key at his,

L. N. Shear's, request in the presence of Mrs. Shear, upon his handing me the original agreement, which was much worn and stained, having been apparently at some time wet, make a new copy of the same and leave it with them, destroying the original in their presence.

E. J. Lutterloh, the J. P. before whom the paper was acknowledged at Cedar Key, testifies that Robinson came to him and wanted him to certify some papers, and would return with Mrs. Shear at nine o'clock, and said he had the paper all ready. About ten o'clock that night Robinson sent for me, and I went to Mrs. Shear's door. Robinson said he was not ready, wanted to have some further conversation with these people. About eleven and a half o'clock Robinson sent for me, and I went to Mrs. Shear's, and all I heard then or at any other time was in the presence of Mr. and Mrs. Shear and Miss Burkhim. Robinson stated, after reading over the paper, that he had loaned these people some money and taken a mortgage on their lands; that subsequently he had bought this land from them and took a deed; that subsequently, to strengthen his title, he foreclosed the mortgage, and at the sale under a decree a personal enemy run it up on him to $8,000. That an attorney had interfered by claiming to represent Mr. and Mrs. Shear; that this action of the attorney had injured the reputation of the Shear's for honor and fair dealing, and the paper they were to sign was to set them right in the estimation of their friends, as also to settle Robinson's rights in the matter. I was convinced by his representations that they had no honest claim against him, and no claim that could be enforced in law or in equity. Robinson said a good many things as he read, or pretended to read, the paper, afterwards signed by Mr. and Mrs. Shear, by way of explanation as he went along, tending to show that honesty and fair dealing required that they should sign

the paper. When the paper was presented for signature, Mrs. Shear asked some questions about its length, and Mr. Robinson's reply was indifferrent. She asked something about time, and Robinson said, "as long as you want," or something to that effect, but I did not know to what they referred. I was not advised of the character of the papers. Robinson wrote or copied a short paper. We witnessed both that and the other that was signed by the Shears. Miss Burkhim was the other witness. After Mr. and Mrs. Shear had signed the paper that Robinson requested them to sign Robinson wrote another paper. I don't know of my own knowledge whether it was a copy or not, and have no knowledge of its contents, it was not read and nothing was said of its contents. The paper was a short one, drawn or copied by Robinson, after everything else was signed and finished, and none of us, as I said before, were advised of its character. In fact I thought Mr. Robinson did not want me to know what it was, and avoided anything that might appear like a disposition to learn. When the paper was presented for signature Mrs. Shear asked some questions about its length, the reply by Robinson I forget; but it was indifferent. Mrs. Shear asked something about time, and Robinson said as long as you want, or something to that effect, but I did not know to what they referred. It was an hour or more from the time I first went to Mrs. Shear's house until Robinson sent for me the second time. I signed both the paper that Robinson wrote and signed and the paper that Mr. and Mrs. Shear signed; as a witness to both, and also Justice of the Peace to the second. Before any paper was signed, and while reading the first long paper, Mr. Robinson, in speaking of the enemy who had run the land up on him, said that this enemy had run it up on him to twice its value, knowing that he (Robinson) was obliged to buy it. That really the present value of the land sold was not half the amount it sold for.

The following correspondence between Lutterloh and Mr. Raney appears in the record:

TALLAHASSEE, FLA., June 18, 1878.

E. J. Lutterloh, Esq., Cedar Key, Fla.:

DEAR SIR: I notice that you are a witness to certain papers executed by Mr. and Mrs. Shear to W. L. Robinson of this place. Mrs. Shear is here now endeavoring to impeach the validity of the execution of the same. I write to know from you whether they were executed squarely and fairly; and if everything done in your presence concerning the same was not done fairly. Please answer immediately. Very respectfully,

GEO. P. RANEY.

CEDAR KEY, June 20th.

Hon. Geo. P. Raney, Dear Sir: Your favor 18th received, and in the manner to which you refer everything that was done was fairly done, if Mr. Robinson's statement of facts was correct, and to this both Mr. and Mrs. Shear assented.

Robinson's statement was, that he had loaned Mr. and Mrs. S. money and taken a mortgage on land; that before the money loaned was due he bought from Mrs. and Mr. Shear the land that was mortgaged to him, and took a conveyance; that recently to strengthen his title he had filed a bill to foreclose the mortgage on this land, got decree, advertised, and sold, and some one run the land up on him and made him pay more than its value, and perhaps double the amount of his mortgage. The excess over the mortgage properly belonged to him, as Mr. and Mrs. S. had no interest whatever in the land, and the papers executed were for the purpose of relieving him from the payment of this excess. If these statements were true, and Mr. and Mrs. S. said they were, everything was fairly done. Robinson

read over, or pretended to read over, to Mr. and Mrs. S. every paper before they signed, and his explanations were very full, and appeared to be well understood by the parties. I was present two hours perhaps, while the papers were being read and executed.

If I can give you any further statement on any particular parts of this matter let me hear from you.

Very truly yours, E. J. LUTTERLOH.

Delia Burkhim testified that she witnessed a paper Mrs. Shear had requested Mr. Robinson to copy. Heard Robinson say at the time that all he wanted was the money Mrs. Shear owed him, and if she paid him in five or twenty-five years he would be satisfied, or words to that effect. She could not remember the exact words, but her impression of the matter was that Mrs. Shear owed Robinson money, and that this paper was written for the purpose of showing that Mrs. Shear had a right to redeem the property, to which Robinson claimed to have a deed to, whenever she paid the money due from her to Robinson within five or twenty-five years.

Mrs. Shear testifies as follows in respect to the execution of the paper at Cedar Key:

That on Friday night, the 14th of June, 1878, Mr. W. L. Robinson came to her house at Cedar Key, Florida; that she was not at home, and that he went to Way Key where she was; that he took her in a boat and she went with him to Cedar Key. He had previously had a conversation with my husband and gone after a Justice of the Peace. Mr. E. J. Lutterloh, the Justice of the Peace aforesaid, came in a short time after I got there. I went to the door, and he said he called to see Mr. Robinson. I went back and told Robinson, who went to the door. Shortly after the Justice left. As soon as Robinson and I got in the house he produced a paper which he said he wanted me to sign, and

which he said had been prepared by Mr. J. T. Bernard, and also a paper which he said was an opinion by Geo. P. Raney. I read the paper which he said Mr. Raney had prepared, the contents of which was about to this effect: that the deed that Robinson claimed to have been given to him by me was good, and the general tenor of the paper, which I can't remember, was that I could recover nothing from Robinson derived from the sale, it being a fraudulent one, no good accruing from it to me. The other paper which Robinson read to myself and husband was quite a long one, the contents of which it is impossible to remember, but the impression made on me on hearing the paper read was that by signing it I would relinquish all claim that I might have against the said Robinson, which was due to me by virtue of the foreclosure sale, or rather that by said paper I acknowledged that I had no rights acquired under the said sale, but I did not understand said paper to mean that I would by signing it, relinquish my right to redeem my personal property and plantation at any time, upon paying the said Robinson the sum of three thousand three hundred and thirty-six dollars mentioned in an instrument of writing made by me to the said Robinson in January, A. D. 1878. My understanding of the whole matter from Robinson's representations and these papers, was that by insisting upon any rights under the foreclosure sale I would do Robinson an injury, as I had no legal claim against him under said sale, and that by signing the paper I merely relieved him from unnecessary expense in consequence of his having to bid eight thousand dollars, and he also persuaded me that it would be dishonorable for me not to sign the paper. After reading the said paper the said Robinson commenced to talk about me signing it; he told me that Judge White told him that there was no necessity to foreclose the mortgage, since he already had

a deed to the property and there was no use in having a double title. He then went on to say why he foreclosed, and it was to this effect: All that he could save of the purchase-money, after deducting what I owed him, he would pay to me instead of certain persons to whom I owed money, Robinson having assumed to pay these debts for me in consideration of a mortgage which I had previously given to the said Robinson; that it made no difference to him, that he would as soon pay me as them. I replied: You agreed to pay these people, and you ought to have done it long ago. I told him that it would not be right, and that I would not agree to any such thing. He also said that Judge White told him that the money over and above his mortgage that he bid would go to him, Robinson, because he, Robinson, represented me, and would receive the money as owner of the place, and he would pay me the money as stated instead of paying to persons whom I owed, such liabilities having been assumed by him. He many times quoted Judge White, and stated that the conversation occurred in court; that Judge White took up the deed and said to him: Robinson, you have this, what do you want with any more? He also impressed upon my mind that it was nothing more than a black-mailing operation on the part of my attorneys and Robert S. Williams to extort money out of him, insisting that it was in the highest degree dishonorable for me to further pursue any proceedings against him in order to require him to pay the money he bid at said sale, always telling me that the proceedings did not affect my rights in any way, and that all he wanted was the money I owed him, and that when I paid it in five or twenty-five years he would be satisfied and relinquish all right to the property; and that he was doing everything in the world for my benefit; and that if the sale was not set aside that all the persons whose claims Robinson had

assumed to pay would set upon me like a set of sharks, and that all that he was doing was for my benefit. Becoming convinced from all these representations of the said Robinson, and having no one capable of advising me, I finally agreed to sign the said instrument of writing above referred to, which I presume was a relinquishment of all claims against Robinson derived from said sale. Deponent further says that said Robinson is indebted to her in the sum of about four hundred dollars, this amount having been assumed by the said Robinson, but I having subsequently effected a settlement of the same, thereby relieving Robinson of the obligation he had assumed to pay. This debt of four hundred was due by me upon a judgment against me held by Cooper, of New York. The said Robinson owing me this money, and never having disclaimed the debt, I insisted upon his paying me. He did pay me one hundred dollars some time after I signed the said paper. There was not the slightest understanding between the said Robinson and I that the said money was paid to me in consideration of my signing the said paper. On the contrary, the said Robinson said that he had brought the money for the purpose of paying it to me as a part payment of what he owed me. Deponent further says: I never should have signed said paper if I had not been convinced, from the misrepresentations of the said Robinson, that I had no rights in the premises, and that it would be dishonorable for me to pursue him. I signed the paper without the slightest consideration, solely upon such misrepresentations. Deponent further says that she gave for her said plantation, which was sold at said foreclosure sale, to the best of her recollection, about thirteen thousand dollars ($13,000); that the value of the personal property, which was also sold, was at least ten thousand dollars ($10,000); and that the freight which she paid for its transportation here was over

one thousand dollars; that the large portion of said furniture having been but little used, and of a character not to be injured by use, is now almost as good as new, a large portion thereof consisting of very valuable paintings, mirrors, fine book-cases, most valuable books, consisting of more than two thousand volumes, elegant bed-room and parlor furniture, which cannot be repaired without great abuse and a very large number of the finest and rarest clothes, ornaments and fancies.

Deponent further says that she neglected to state, when speaking of the conversation between herself and Robinson at Cedar Key, "that a certain paper given by the said Robinson to her, dated January 10, 1878, for the purpose of putting in writing evidence to the effect that a certain instrument of writing, made by her to the said Robinson in January, A. D. 1878, was not a deed in fee simple, but an instrument made to secure the payment of money owed by her to said Robinson, having been wet and thereby impaired, the said Robinson agreed, at the request of this deponent to make a copy thereof. He pretended to make a copy thereof. I took the original and laid it under a paper on the counter shortly after Robinson had pretended to copy it; without my noticing him he took the said original, and, without saying anything to me, destroyed the same by tearing it in small pieces. I did not know that he was destroying it until he had thrown the small pieces on the floor. I did not read the paper until the next morning, when I found that he had not made a true copy of the original, but had changed it so as to make me liable, before I could redeem, to pay for all expenses of said plantation incurred in improvements thereon, with interest at the rate of eighteen per cent. My recollection is that I agreed to pay him only sixteen per cent, and it was stated in such original paper, and also the conclusion of such pre-

tended copy, to-wit: the words, 'up to the date of such sale,' if made to them, were interpolated. This copy was signed as witnesses by E. J. Lutterloh and D. G. Burkhim. The witnesses did not compare the original with this pretended copy. I never was informed by Robinson or any one else that my property was advertised for sale, although I had received several letters from Robinson within a month previous to said sale. Robinson appeared to be exceedingly anxious to know how I had received the information that the property had been sold previous to his writing to me about it."

LeRoy N. Shear testified as follows in regard to the paper signed at Cedar Key: That he, on the 14th day of June, 1878, signed a paper presented to him by William L. Robinson at Cedar Key, Florida, which said paper the said deponent understood to be, and was represented by the said Robinson to be, a relinquishment of this deponent's and his wife's, Eliza E. Shear, of all right they had to claim from the said Robinson certain money which the said Robinson had bid at the sale by the master of certain property belonging to said deponent's wife on the first Monday in June, 1878, in the City of Tallahassee, under a decree of foreclosure in favor of said Robinson against the deponent and his wife; and that the deponent was induced to sign said paper by the false representations of the said Robinson that the said sale was an unfair and fraudulent one, and that one R. S. Williams had run up said property for the purpose of defrauding the said Robinson, and that certain attorneys in Tallahassee, who were pretending to represent the interest of this deponent and his said wife in procuring the said money from the said Robinson, were merely engaged in a black-mailing operation against him, the said Robinson, and that the whole matter was merely an attempted swindle on the part of the said R. S. Williams

and the said attorneys, D. S. Walker, Jr., and E. M. Hopkins. Deponent was also led to sign said paper by the representations of the said Robinson that Judge P. White had said that this deponent and his said wife had no rights in the premises, and were not entitled to the said money that Robinson bid at said sale, or any part thereof, since the said Robinson already had titles to the said property, and there was no necessity for it to be sold under the mortgage. Robinson also said that unless the said sale was set aside Mrs. Shear's creditors could collect out of him the debts Robinson had agreed to pay for her. Deponent also says that Robinson brought with him to Cedar Key this said paper already prepared, and said that Judge J. T. Bernard had prepared it, and that the said Bernard had said that it was the proper paper for this deponent and his wife to sign, and that it would be dishonorable for them not to do so. He also brought a paper which he said was an opinion of the Hon. G. P. Raney, which was to the effect that this deponent and his wife had no rights in the premises; and it was in consequence of these false representatoins and surrounding circumstances that induced him and his said wife to sign the paper, and that in signing it this deponent understood it to be nothing more than a confirmation of a conveyance made by himself and his said wife to the said Robinson in January, 1878, which said conveyance was made for the purpose of securing to the said Robinson the payment of $3,336.91-100, which he claimed to be due him from deponent's wife, and for the further purpose of acknowledging that these deponents had no right to claim anything from Robinson since the sale was a fraudulent one, and the said Robinson ought not to be held to it; that this deponent did not read the said paper; that it was quite a long one, but that the said Robinson pretended to read it to him and his said wife, but that he did not read that por-

tion of said paper which authorizes the master to make deed of said property to the said Robinson; that said deponent did not know when he executed said paper that it contained any such provision, and would never have signed it had he been so informed; that the said paper was executed without any consideration whatever, either to him or to his said wife, and it was merely to prevent, as he thought Robinson from being cheated and defrauded, he being convinced that he and his wife had no legal and equitable rights against Robinson in the premises.

Mrs. Shear, in the deposition of 19th of June, 1878, says that when Robinson came with the Justice (Pepper) and others, on January 4, he took her into a room and told her he wanted her to understand so that there would be no objections before these other persons who came as witnesses; that if I had any objections he wanted her to make them there in that room; that he did not want any discussion of the matter or any objections before the witnesses when she went to sign the paper. She replied to him: "What objection can be made? I suppose we all understand the matter." * * * He then, for the first time, informed me that the paper he wanted me to sign was a bill of sale, and not an agreement to foreclose the mortgage. I then told him I would not sign it in that form. He persisted in my signing it, and refused me aid unless I would sign the paper. Being at this time reduced to the most dire necessity, my husband sick and unable to turn in bed, I not having one dollar in four months, and suffering for the necessaries of life, * * * and having no other recourse, without a friend, I finally agreed with said Robinson if he would give me an agreement, in his own hand writing, to the effect that I might redeem my property by paying him the amount mentioned in said instrument, I would sign it. This he agree to do. The paper being signed, and the

witnesses having gone, Robinson then sat down and wrote an agreement and signed it, and handed it to Mr. Shear. I had this agreement until the 14th of June, 1878. Robinson then and there expressed himself that this instrument of writing was intended as evidence that the paper which I had signed was only meant as a security for the money mentioned, and as evidence that I could redeem my land and personal property at any time. The $1,700 and upwards, mentioned in said paper which I signed as aforesaid, which Robinson claims to be a deed in fee, I considered as advances made under an original contract, except the $500 which necessity and privation forced me to take under circumstances already narrated.

J. A. Malambre testified that he was a witness to the deed. Soon afterwards Robinson told Mrs. Shear she had sold all her property except her wearing apparel. She expressed regret that some articles were included, but consoled herself with the understanding that she might redeem them in a certain time. The house and furniture were dilapidated. His affidavit also states that he, deponent, has since, on several different occasions, heard Mrs. Shear express regret that she included in the sale certain articles which she appreciated more on account of association than their money value, but she consoled herself with the understanding that she might redeem them in a certain time. Deponent resided and lived in the family mansion, eating at the family table, and Mrs. Shear was much of an invalid, and the direction and control of the house-keeping was left to Mrs. VanNess, and it was the impression of deponent that this was the choice or desire of Mrs. Shear, and, deponent never heard any objection to it or any expression of dissatisfaction or complaint about the same until after the sale above mentioned. There was always plenty to eat of the best quality, according to the manner in which good or

well-to-do people live in Florida; * * * that when W. L. Robinson took possession of the "Glenwood" property, in Leon county, mentioned in the affidavit made by deponent on the 20th of June, 1878, and since the deponent has been on said place, that he, Robinson, has made great improvements; that nearly every piece of furniture has been repaired to a large extent; that said furniture was in a very bad and broken condition, and some of the same is still in a bad condition—marbles being broken, and it being otherwise damaged and being stained; that the house has been repaired, new sills put in the porch above and below, floor taken up and renewed, joists renewed, pillars repaired, tin work renewed about chimneys, gate-way and pailing repaired, new steps built to the house, two miles of plank fencing built, one cistern built, another repaired, the pumps have been repaired. The bulk of this repairing has been done since January 3, 1878. The roof of the house has leaked ever since deponent has known it.

John D. Perkins estimates the value of the Glenwood Plantation at one dollar per acre, exclusive of the dwelling-house and surroundings. The land is of small value on account of nut grass. A plantation in this county, free from nut grass, with a gin house and good cabins on it, is estimated at $4 per acre.

Dr. A. B. Hawkins testified that he is somewhat acquainted with Glenwood Plantation. Went with Mr. Shear when he bought the place of Col. Williams. The place is worth about $3 per acre, including the improvements. Land studded with nut grass is not worth more than $1 per acre.

G. A. Chaires says he is familiar with the Glenwood Plantation, and it is not worth over $2 per acre on account of having nut grass on it. The land is old and much worn. Williams wanted to get rid of it on account of the nut grass among other reasons. He had rather pay $10 per acre for land without nut grass than $2 for land with it.

R. C. Parkhill would not give more than 50 cents per acre for the place leaving out the dwelling-house—it is covered with nut grass. The dwelling-house before Robinson made repairs was not worth more than $1,000, or about that. Thos. W. Carr, N. W. Eppes, F. W. Isler and W. J. Johnson agree with the estimated value as made by Parkhill. Their affidavit is as follows:

Personally appeared R. C. Parkhill, Thomas W. Carr, Nicholas P. Eppes, William J. Johnson, Frederick W. Isler, and they being duly sworn say each for himself that he has been a farmer in this county for upwards of thirteen (13) years, except said Parkhill, who has been a farmer here for the last seven years, and the said Johnson, who has been a farmer here for upwards of six years, and each of them has lived in said county more than 20 years; that they are familiar with the lands and plantation and premises, including improvements, in this county, known as "Glenwood," now occupied by W. L. Robinson; that said plantation and improvements thereon have also been carefully inspected by them this day, having ridden over the plantation and gone through the house. The said Parkhill says that the land is full of nut grass, nearly covered with it; that the land is poor, even if there was no nut grass; that for farming purposes he would not give more than fifty cents an acre, leaving out the dwelling-house; has never seen any land more fully covered with nut grass. The dwelling-house, considering its condition before Mr. Robinson made repairs on it, was not worth more than $1,000, or about that sum. The said Thomas W. Carr says that he agrees with the statement made above by said Parkhill, except that he thinks the valuation of the dwelling too liberal. The said N. W. Eppes says that he thinks the said estimate of Parkhill the full value of said property; and said Isler and Johnson also say that said

estimate of Parkhill is the full value of said place for farming operation. Deponents furthers say that there is no timber of any value for fencing or farming purposes on the said lands, except a small quantity of timber on the branch, consisting of green and old field pines. The land is very old and much worn. Deponents have lived in this county for many years, each at least twenty years; that they consider three thousand dollars for the land and improvements and personal property in the dwelling as a very large price for said property, and more than it is worth for any purpose it can be used for in this county. Said plantation has always had the reputation of being very much injured by nut grass. Deponent Isler says that this place has had nut grass for the last thirty odd years, and he has known the land since before it was cleared. Deponents further say there is no ginhouse nor any screw on said land, nor fence on the same—except a new fence made by Mr. Robinson—the out-houses are in a dilapidated condition. The deponent, Isler, says that he has been farming in Leon county about 40 years, and the Burgess Town Place, sold by F. R. Cotten to W. R. Wilson in 1878, at about $2,90-100 per acre, is worth more than six times as much per acre. Johnson says that the Kirksey Place, purchased by Saxon & Dickenson in 1877, at about $3.50 per acre, is worth more than six times the said Glenwood Place per acre. Deponents further say that they do not believe that farming operations can be carried on successfully and profitably on said "Glenwood" Plantation.

Geo. Damon had inspected the furniture in the house at Robinson's request, and estimated its full value at $754.-75-100.

Mary E. Risley testifies that in November, 1877, Robinson came to her and requested her to "prevail on Mrs. Shear to sell him the place for $900; that it was the best

thing that she, Mrs. Shear, could do, as she had gotten all the advances that he had agreed to make, and that he was now providing her gratuitiously." She spoke to Mrs. Shear about it, and she said she had ridden in from the country with Robinson that morning, and that he had asked her to sell; and that he had talked business to her until she was almost wild. When witness told Mr. Robinson that he had better speak to Mrs. Shear himself, he said that he, holding the papers, could not do so.

Charles C. Pearce says that he went over the place very recently with Mr. Robinson, P. Houstoun and James Donelson, and visited six crops Mr. R. had on the place of corn, cotton, potatoes, &c. They compared favorably with other places on the road. Thinks the plantation as good as any between Tallahassee and Earle & Perkins', adjoining. Nut grass is injurious to cotton, but does not materially injure other crops. I cannot say what the plantation is worth because I do not know. It was the conclusion of the committee not to place money valuation on the plantation. The circumstances under which sales were made were so different that we did not feel competent to place money valuation on it. We thought no one competent to price others' property. We did not know whether we should put a forced sale price or a fair sale price, and therefore did not value it at all. I own a plantation in this county; I have nut grass on about one hundred acres of my place, the balance has no nut grass, or not much. So far as the land is concerned, Mr. Robinson's, or the place in question, averages as good as mine; that is, it will produce as well. I have about 200 acres of wood land on my place, which would of course make it more valuable with the location, being nearer the City of Tallahassee. I only went in the lower part of the house; four rooms were furnished. I noticed some of the furniture because it was pretty. The library, I should

think, it occupied about ten feet square on the wall. I have not the least idea of value of the library or contents. Mr. Robinson told me he was getting 800 pounds of lint cotton as rent to each mule, and there were six mules. I hold my place at ten dollars an acre, but I don't care to sell at that, particularly as I am getting rents that pay me better; but would sell at that if I could get all in cash so as to make another investment. The average rent of land in this county for as much as one mule can work is from 500 to 900 pounds of lint cotton. I can answer as to how I estimate the value of lands in the county no other way than by what interest it can be made to pay by management. If good management it can be made to pay a good deal; if badly managed, not much. I look upon renting as the only safe way for planters to work to make money, while it is injurious to the land. Robinson told me he was getting 800 pounds lint cotton to the mule, and there were six mules. So far as the land is concerned the place averages as good as mine; will produce as well. I hold my place at $10 per acre. The average rent of land in the county for what one mule can work is 500 to 900 pounds lint cotton. The main building could not be put up for less than five or six thousand dollars, and the out buildings would cost about $1,500. These lands, at forced sale, might not bring over two or three dollars per acre; at private sale might bring six or eight dollars. Mr. Robinson said the place would compare favorably with other lands around except for the nut grass.

Lewis Austin says he has lived on the place 16 years, and rents about 35 acres, and pays 800 pounds of lint cotton as rent. There are seven renters beside me.

Frank Pemberton rents 35 acres of the place, and pays 1,000 pounds lint cotton. There are seven other renters on the place. One other pays 1,000 pounds, and the others 800 pounds, as rent for same quantity of land.

James B. Donelson went over the place with Robinson, Houstoun and Pearce. Thought this compared favorably with other plantations adjoining, except for nut grass. Those crops which had been well cultivated were fair crops; compared favorably with those I saw in riding there. Taking the crops as a whole, cotton and corn, they would average equal with other crops around. The value of the plantation is about the same as the rest around there, but for the nut grass. Land that rents for 800 pounds lint cotton for each 40 acres is pretty valuable land; it is a high rent. Mr. Robinson said he thought it would cost $10,000 to build such a house. I thought it worth now four or five thousand dollars.

P. Houstoun was with Robinson, Donelson and others over the plantation, and says: I agreed with the opinion Mr. Robinson expressed as to value; that it was of average quality with places in the vicinity, the difference being that there is nut grass on it. Land that will rent for 800 to 1,000 pounds of lint cotton for such quantity as one mule will work ought to be worth from $12 to $15 per acre. The crops where they were well worked on the Glenwood Place were pretty good; about equal with other crops on the road. Estimate that 1,000 pounds lint cotton is worth $90, a mule will work about 30 or 33 acres, this would be $3 an acre rent, which would be a good rate of interest on $12 or $15. I know so little about the facility of renting out lands in that neighborhood that I cannot answer as to its value, or as to its being worth $12 or $15 per acre; but if the whole place can be rented at the same rate as the parts cultivated this year are rented at, it would be worth $12 to $15 per acre, and perhaps more, considering the elegant residence on it. I don't know how the place is off for wood.

Question.—Do you know of any plantation of like quality,

age and quantity with the Glenwood Place selling at $12 to $15 per acre?

Answer.—I don't know of any sale having been made that will suit these three conditions of quality, quantity and age. I am not familiar with the sales that have been made; never attended any of them, and don't think I could say. I mean the Glenwood Plantation would be worth $12 to $15 per acre if it could be filled up entirely with renters at 800 to 1,000 pounds of lint cotton every 33 acres.

Judge Bernard testifies in behalf of the complainant that he attended the sale as solicitor for the complainant, and that at the sale R. S. Williams was a bidder, and bid up to $7,900 for the property, complainant then bidding $8,000, and the property was then knocked off to him; that after the sale he met Williams, who stated that having consulted counsel he was satisfied Robinson could only claim the amount of the decree and costs, and that he had intended to bid for certain parties as high as five thousand dollars, but if Robinson had taken him aside and promised him a couple of hundred dollars he would not have given him any trouble; that it was a common thing for parties to buy in property at public sale and be paid $50 or $100 for their bargain. Afterwards Williams said he understood Robinson was angry with him for running him up the property, but that he ought not to be, as Robinson himself had done the same thing for him on one occasion, and if Robinson had taken him aside and paid him one or two hundred dollars it would have been all right.

Thomas J. Perkins testified that he asked Williams why he had run up the property, and Williams answered: "Why did not Robinson call me aside and offer me one or two hundred dollars?"

R. S. Williams testifies that he was a bidder at the sale for the purpose of buying the property; that he had in-

quired into the character of the title to be acquired by such purchase, and bid thereon $7,900 in good faith, and gave Robinson no reason to believe otherwise, and he deemed the property worth the amount, and was willing and prepared to pay the amount of his bid for it. He was abundantly able to pay, and he had no intention to annoy Robinson by bidding.

Julius Diamond testifies that he was present at the sale; that he heard Williams inquiring particularly about the titles to the property, and before the sale heard him express a desire to purchase it. Williams is perfectly good and solvent, and abundantly able to pay the amount of his bid.

M. Lively testifies that he was present at the sale, and heard Mr. Williams ask that the sale be stopped awhile that he might inquire into the title. The master referred him to the decree. Robinson and Bernard were standing near enough to hear.

Bolling Baker testified that he was employed by the parties to draw up the mortgage and the lease referred to, dated August 1, 1877. Understood from Mrs. Shear that as she was embarrassed and could not carry on business without aid, and Mr. Robinson having made some advances, reluctantly entered into the matter, and said that if he took the mortgage he would not be able to indulge her longer than the time expressed in the mortgage, as he could not well afford to spare the money from his business. Mrs. Shear meantime intended to live on the place, and not being able to carry on the plantation would, by renting it, have something for support until she could sell. Afterwards Robinson having advanced more than the mortgage secured, and a sale having been agreed on both parties employed him to draw up a deed of conveyance, which he did and sent it to Robinson from Orange county in December,

1877, with a bill to foreclose the mortgage, with directions to Robinson to fill in the amounts of money consideration. Understood from Mrs. Shear and R. that this deed was intended to carry out an agreement for an absolute sale of the property. Did not advise the foreclosure of the mortgage, but acquiesced in it.

He says: I became acquainted with defendants, Shear and wife, shortly after their removal to Leon county, Florida. I have known plaintiff slightly for several years. They all reside in Leon county. I prepared a mortgage about the 1st August, 1877, at the request of plaintiff and defendants, and signed my name as witness thereto with Judge Rippey, and I believe the paper annexed is a copy of said mortgage. I know very little about the negotiations which led to the execution of the mortgage. I had never been employed by plaintiff as counsel or attorney in any of his business. Plaintiff came to my office in Tallahassee and said that Mrs. Shear requested me to go with him (Robinson) to her store near Gallie's, in Tallahassee. This was, I think, in the latter part of July or 1st August, 1877. I went to the store (Robinson having preceded me); I found them, the defendants and Robinson, and there were several other persons about the room, but not immediately present but within hearing. I was informed by defendants that they had been negotiating with Mr. Robinson for a loan in order to pay off some pressing demands against Mrs. Shear. They had already agreed upon the terms, and had desired me to act for both parties in completing the transaction. A number of questions were asked by plaintiff and defendants, and I explained fully the legal effect of what was proposed to be done. The interview lasted for, I think, some two hours, during which time the affairs were freely discussed and without reserve. Mrs. Shear repeatedly stating that she could not carry on her business without pecuniary

aid, and plaintiff as often stated that while he was willing to aid her yet it was exceedingly inconvenient to him to spare the money, as he was compelled to keep all of his money in his own business, and that if he took the mortgage and made the advances he would not be able to indulge Mrs. Shear longer than the time expressed in the mortgage; that he would greatly prefer that some one else should have been selected to assist her, but that he was willing to aid her to the extent of his power, but could not afford to carry the burden of such a loan any length of time, as it would embarass his own business, and that it must be distinctly understood that he would be compelled to enforce the repayment of his advances according to the terms of the proposed mortgage. The result of this interview was a request from Mrs. Shear to me to draw up the mortgage, and I made a memorandum in writing of the terms, and read it over to all the parties before I left the room, and I afterwards prepared the mortgage at my office. At the time of this interview there was a list of the debts made out which plaintiff was to pay, and the amount stated in the mortgage was the sum of these several amounts. Robinson, always when I was present, insisted upon a strict compliance with the terms of the contract as before stated. Robinson at all times when speaking of the matter asserted his wish to be out of it and of the great inconvenience and trouble it would cause him to keep so much money out of his own business for any length of time. After the mortgage was prepared and ready to be signed similar conversations were held, and the entire subject of Mrs. Shear's embarrassment was fully and freely discussed in all of its details. I had previously acted as attorney for Mrs. Shear in procuring for her advances from merchants of Savannah, Ga., upon mortgage of the same property mortgaged to Robinson. Throughout all of the

various interviews and consultations I was consulted as freely by one as the other, sometimes in the presence of all, and at other times by Mrs. Shear alone or Robinson alone, and each seemed to speak with equal freedom and an equal understading of their relative positions and intentions of each other. I prepared a lease of the date 1st August, 1877, at the request of both plaintiff and defendants, but was not consulted about that contract particularly. The parties had agreed to enter into that contract, and I understood from what was said that Mrs. Shear had at that date (say August, 1877,) some hope of being able to pay off the mortgage which she was about to give to Robinson when it became due, and in that event not being able as she said to carry on the plantation herself she desired to lease it for such time as she thought would enable her to get relieved from her embarassments, or give her time to find an absolute purchaser for the property. In the meantime I understood from all parties that it had been determined that Mr. Shear should go North and engage in business there, and that Mrs. Shear was expected to reside upon the plantation free of expense, and to receive the rents.

I prepared a deed at the request of plaintiff and Mrs. Shear, and I believe the paper in the record, dated January 4, 1878, is a copy of the original prepared by me. In all the transactions in which I took part relating to said deed I acted as attorney for all the parties at their express solicitations.

I know but little of the negotiations which took place between the parties terminating in making this deed, except as I heard them from the parties themselves. I do not know how long such negotiations were pending, but some time after the execution of the mortgage heretofore mentioned (I cannot recall the date) Mrs. Shear came to my office in Tallahassee and entered upon a detailed statement

of her embarrassments, and subsequently sent for me to her place of business, then, I think, near the Post-office, in the Nims building. I had frequent interviews with her between August and November, and she discussed various plans for settling up her business, and finally informed me that it would be impossible for her to pay the Robinson debt, and that without a sale of the plantation the mortgage could not be paid. She finally informed me that Robinson had been making other advances for her besides those named in the mortgage, and that she had determined to sell him the property absolutely, for she had no hope of redeeming the mortgage, and that a certain sum of money at that time would be of greater advantage to her than the rent she might get, even if the property could be redeemed; and that she had already received money, and would receive more from Robinson; and that she saw no means of paying it without a sale of the plantation. I advised her not to sell then, but to apply to her friends at the North for assistance; and that it could only come to a sale at last under a foreclosure of the mortgage, and that before such sale could take place property might enhance in value and she might find a purchaser for a better price than the amount of her debt to Robinson. Her reply in substance was that she had no hope of aid from her Northern friends; and that she wished to settle the debts by giving up the property, so that her mind would be releived from the anxiety attending upon the embarrassed condition of her affairs, and that she could turn her attention to some other business. The above is the substance of the numerous conversations at various times after the mortgage of August 1st was made. During the period of which I speak, after the mortgage and lease had been made, I occasionally met Robinson at Mrs. Shear's store, and he sometimes came to my office. In one of his visits to my office he told me that

Mrs. Shear had proposed to sell the property to him, and asked me if she had said anything to me about it. I told him that she had, and that I had advised her against doing so. Robinson remarked that he was glad of it, for he did not want to take the property, as he was then owning as many places as he could manage, and would rather have his money back in his business than to keep the property on any terms. I then told him that I could not discuss the matter with him as Mrs. Shear had not authorized me to say anything upon the subject to him. I subsequently met Mrs. Shear and Mr. Robinson together at the store of Mrs. Shear, but I do not remember at whose request. At this meeting Mrs. Shear stated her determination to sell to Robinson absolutely in consideration of the sum advanced under the mortgage and other sums since advanced, none of which she could pay. I declined giving any further advice about the details of the sale, as Mrs. Shear had not taken the last about selling, and so only took a memorandum of the amount which was stated to have been advanced by Robinson, and I was requested from that to draw the deed. I did prepare the deed, but for some cause, (I think Robinson went North,) I did not give it to the parties, and I kept the deed and brought it to Orange county with me, and enclosed it to Robinson some time in December, 1877; and I do not think I saw Mrs. Shear after that time, for I was not in Leon county when the deed was actually signed. I received a letter from Mrs. Shear, dated, I think, at Cedar Key or Tampa, but she did not allude to her business matters with Robinson, or her business in Middle Florida. The deed was intended to convey all of Mrs. Shear's remaining interest in the property absolutely to Robinson, and my instructions were to that effect.

I prepared the deed in accordance with the express directions of both Mrs. Shear and Robinson. It was certainly

so expressed, and I heard no intimation to the contrary; but the deed was not then written.

My impression is that I sent the bill for foreclosure of mortgage to Robinson with the deed in December, 1877. I think the bill and other papers were placed in the hands of Judge Bernard, of Tallahassee, who, I think, was Mr. Robinson's attorney in the case, and who obtained the decree of foreclosure. My impression is that I did not advise a foreclosure, but drew the bill at Robinson's request and sent it to him. I was not in Leon when the last deed was executed.

I think the first interview at which I was first present with both Mrs. Shear and Mr. Robinson was in the store occupied by Mrs. Shear, near Gallie's store. Mrs. Shear, at that interview, did speak of debts that were pressing her, and I think there was a list of them already made out in writing. I think some property of Mrs. Shear had already been *levied* on for taxes, and it was evident must be sold if the taxes were not paid; but I do not remember the remark you quote.

I took the mortgage to the store to be executed; Robinson repeated what he had said before about the inconvenience of letting the money out of his business, and again stated emphatically that he could not give longer indulgence than that provided for in the mortgage. I know nothing about the negotiation for the lease, but understood it was intended as a protection to the property *after* the mortgage debt was paid until Mrs. Shear could make better arrangements. I mean by protection to the property that it should be occupied and kept in good order by a tenant who was able to improve it until Mrs. Shear was able to sell it. Mrs. Shear seemed to have a perfect understanding of the effect of the mortgage and lease. My impression is that they were both executed on the same day and at the same place.

There seemed to be an understanding between the parties that Mrs. Shear was to reside in the house free of charge, but there were no specific statements called to my notice as that time about it by either party; I only heard the conversation. I do not remember Robinson asking me to persuade Mrs. Shear to remove into the country at any time, but he urged her to do so several times in my presence, giving as a reason that she would live with more economy and save house rent. She said she did not approve of that part of the plan which involved her going into the country, because she was unwilling to occupy a house of which she was not the mistress, and that she had plans of her own to carry out which would require her to reside in a town.

After the execution of the mortgage of August 1st, 1877, I had several interviews with Mrs. Shear, but I am not able to state the exact dates, or the localities of these interviews. In all matters relating to the business of Mr. and Mrs. Shear with Mr. Robinson, so far as either or all of them consulted me, I acted avowedly and by request as attorney for all.

Mr. Robinson has never paid me any money on his account for services rendered in the affairs with Mrs. Shear, nor has he ever paid me any money on any other account for him. All that he paid on the acount of affairs with Mrs. Shear was the $25 for drawing the papers, and which, as before stated, was included in the itemized amount of $225, with the credit of $25, leaving a balance of $200, for which Robinson gave his note, and which was paid to Messrs. B. C. Lewis & Sons, and by them paid to me and included in the Shear indebtedness.

I never had any business transactions with Mr. Robinson until I acted for him and Mrs. Shear at their request in their joint business, and my opinion of his business qualifications, or unusually developed capacity for business of a

financial nature, if I formed any such opinion at all, would be that Robinson, in the then financial condition of the country in August, 1877, took a very imprudent risk for a merchant in advancing over $3,000 upon Mrs. Shear's plantation in Leon county, if he expected to recover his money out of a sale of the mortgaged premises, although I think the property may in the future be worth this amount or more, but I speak of it as risk taken in August, 1877.

In my course of dealings with Mrs. Shear she exhibited great force and ability in dealing with questions concerning her business, but she was vacillating and disposed to yield her business interests to the frequent infirmities and necessities of her husband,and to the circumstances growing out of his business, such as the suits against Mr. Shear.

At the time of the execution of the mortgage and lease Mr. L. N. Shear was in better health than I had previously seen him in (except at intervals). Mr. Shear was very intemperate, and when he was under the iufluence of intoxicating liquors I do not think he had the ability to attend to any business, but when he was sober he was not only able to attend to his own business but gave evidence of good business talents and qualifications. I never attended to any business with Mr. Shear when he was unable to attend to his business properly, and never did any business at *his* request, but at the time of the execution of the mortgage and lease Mr. Shear was capable of attending to business, and was then speaking of resuming his business connections at the North, and did go North subsequently with that view.

I have not answered that Mrs. Shear at any time when I performed any service as attorney for her was incapacitated fo instruct me as to what service she required me to perform.

In regard to the business between L. N. Shear and Mrs. Shear and Robinson, all important matters were done when

the parties were all present and capable, in my opinion, of doing the business, I mean to the execution of the papers about which I have been interrogated. What transpired at other times when I was not present I have no knowledge of.

I do not know about all of the negotiations between Mr. and Mrs. Shear and Robinson. Mrs. Shear exhibited and expressed great distress on account of her pecuniary embarrassments, and from her appearance and statements in the presence of others she certainly did suffer bodily pain, but I know nothing of the effect which such suffering had upon her business capacity, and always thought that the intemperate habits of Mr. Shear were her principal trouble.

I can only form an opinion from the sequel to those transactions, from which it appears that either separately or alone, or with the aid of astute counsel, Mr. and Mrs. Shear have proved so far not only a match for Robinson, but seem willing and able to look with great complacency upon the loss of his money expended in their behalf.

I have stated that Mrs. Shear did not execute the deed of 1878 in my presence, and that when I received instructions to prepare the deed Mrs. Shear was fully aware of the exact intent and purpose of the deed which she was to sign, and had expressed their inability to obtain assistance elsewhere than through Robinson.

From the statements of Mr. and Mrs. Shear, made in the presence of Mr. Robinson, the want of money alone induced them to borrow it, and to provide for its repayment in all of the conveyances, and having failed to repay the money, the deed of 1878 was given as an equivalent for the money advanced and accepted as a full and final payment for it. My belief, founded upon a knowledge of all the facts is, that Robinson had no other advantage than any other creditor of Mrs. Shear, and that his advances of money prevented

sacrifice of her property under executions which she was unable to pay.

I do not know anything about the advances subsequent to the mortgage, except as stated by Mrs. Shear, and cannot speak accurately as to the amounts, or how advanced or paid. The deed of 1878 was given in consideration of advances over and above the sum secured by the mortgage of August 1, 1877.

My impression is that I did not advise the foreclosure suit, but I think I concurred in the opinion for the reason that there was a prior mortgage which Robinson had paid, and it was thought best to foreclose against all persons claiming by, through or under Mrs. Shear, in order to perfect the title under the absolute deed from Mrs. Shear to Robinson. My impression is that after Mr. Robinson had consulted Judge Bernard, who had been his attorney in other business, I said to Mr. Robinson that I saw no necessity for immediate foreclosure of the mortgage; that I considered the last deed of Mrs. Shear, or the deed which I was instructed to prepare, a sufficient title to the property, but that as Alexander & Maxwell, of Savannah, held a prior mortgage, but transferred to Robinson or purchased by him, I concurred with Judge Bernard that a foreclosure of the mortgage to Robinson was the safest mode of extinguishing all prior incumbrances.

I do not know of any such convesation, but state generally that the foreclosure was the subject of conversation between Mrs. Shear and myself and Mr. Robinson frequently, but I cannot give any precise dates, for it was a subject of interest to both parties, and whenever the occasion offered each would speak of it, and Robinson, always regretting having become entangled in Mrs. Shear's business, so as to compel him to take the property or lose his money, between the two I was very much annoyed, for after the determina-

tion to have a final decree made I did not care to waste my time listening to any matters of detail which could be arranged without my advice or presence, and as I did not consider myself any longer the attorney of either party in that matter I could not advise one without the presence of the other.

I have stated that I was not present when the last deed was signed, but the intention of the parties (if either of them is worthy of credit) was disclosed, when I was requested to prepare the last deed for Mrs. Shear's execution.

I cannot speak accurately as to the dates, but I came to Orange county in time to attend the spring term of the court, which I think convened on the third Monday in May, 1877. I returned to Tallahassee, I think, some time in June. I then remained in Tallahassee, with the exception of an absence of a week or ten days in Atlanta, Ga., until I returned to Orange county in time to attend the fall terms of the Circuit Courts in Volusia and Orange counties in November, 1877. I then returned to Tallahassee and remained there but a short time, and came back to Orange county in December.

I am under the impression that the deed and the bill were sent by me in a letter to Robinson from Maitland, Orange county, Florida. I may have drawn up and enclosed at the same time an answer or form of answer, but as this case had then passed out of my hands I do not know whether Mrs. Shear ever signed the answer, or ever answered at all in the case.

Robinson's testimony in almost every point bearing upon the questions in issue is contradictory of that of Mrs. Shear. They agree that he, at her request, and to relieve her financial embarrassments, advanced her at first a small sum, about $100, taking a mortgage on furniture. After

wards he reluctantly advanced money to pay her taxes, and took up a $500 mortgage, and made engagements to pay debts amounting in all to $1,590, when the mortgage was taken to secure this amount August 1, 1877, payable one day after date. At the same time he leased the plantation and personal property for five years at the annual rent of 3,000 pounds of cotton, and entered into possession. This mortgage and lease covered all the property she possessed at the time, except her personal apparel. Soon after negotiations commenced, resulting in the paper called a deed, dated January 4, 1878. This deed and the circumstances, agreements and inducements attending it she claims was on her part intended to operate as a security for the liabilities assumed by Robinson, and indebtedness then existing, and $500 then advanced to her. Robinson, on the contrary, details circumstances and conditions going to show that the deed was the result and consummation of an absolute bargain and sale, divesting her of all right, title or interest in the property, and that the price then agreed on and paid was the full value of the property. He gives in evidence the written orders of Mrs. Shear dated January 4, 1878, on Mrs. Risley and Mr. Sims for certain property in their possession "formerly belonging to her, as I have sold all my effects to Mr. W. L. Robinson." He further insists that the mortgage foreclosure was a part of the proceedings agreed upon to consummate his title, and to cut off any latent claims that might be discovered against Mrs. Shear which might be charged upon the property. He refers also to the "agreement" dated January 10, 1878, and says it was an arrangement entirely distinct from the conveyance, and not suggested at that time but some days later, while Mrs. Shear says the original of this agreement was written and signed by Mr. Robinson immediately after the signing of the deed and the answer to the foreclosure bill, and as

a part of one transaction with these papers. In reference to the foreclosure sale Mr. R. says he would not have bid more than the amount of his investment but for the advice of his counsel; that as he had title by his deed he could bid any amount without incurring a liability to pay any more money, the property being his own and the Shears having no claim upon it or the proceeds of a sale. He regarded the foreclosure proceedings as "a mere matter of form."

As to the paper executed at Cedar Key, the testimony of Mr. Robinson, Mrs. Shear, Lutterloh and Miss Burkhim contains all the light that the record throws upon it.

The testimony of Alex. Gallie, J. Burkhim, H. R. Shine and Mary E. Risley agree to the effect that Mr. Shear was, on account of dissipation and ill-health almost wholly incapacitated for transacting business, and that Mrs. Shear, owing to the condition of her husband and other causes, was not capable of managing business of importance, and might be easily imposed upon.

There was some testimony going to show that at the time of the execution of the deed of January 4 there was no "separate acknowledgment" by Mrs. Shear, as certified to by the Justice, and that the certificate to that effect was false. Mr. and Mrs. Shear and the Justice himself testify to this, while Mr. Robinson says the acknowledgment was made by Mrs. Shear, not in the immediate presence of her husband but in another part of the room.

[The last sentence on page 398, in the eighth paragraph of Robinson's reply, should read as follows: "Petitioner denies all that is stated between the word 'that' in fifth line of page 393, and the word 'paper,' in fifth line of page 394, inclusive." The affidavit referred to on page 399, as marked "A," is the same in substance as Robinson's testimony on pp. 405 to 410.—REPORTER.]

D. S. Walker, Jr. & E. M. Hopkins for Appellant.

George P. Raney for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

I. The referee properly found upon the testimony in this case that Robinson was in the first instance reluctant to become a creditor of the appellant, and became so because of the importunity of and sympathy for her on account of her embarrassments and misfortunes.

II. We agree also that the lease and the mortgage of August 1, 1877, were not and were not intended by either party to be one instrument or contract. The mortgage is not a qualification of the lease, nor the lease of the mortgage, neither is dependent upon the other; although it is probable that the lease would not have been entered into but for the mortgage indebtedness.

III. The conclusion is inevitable also that the possession by petitioner of the real and personal property, although embraced in the mortgage, was delivered and obtained in virtue of the lease.

IV. The conveyance of January 4, 1878, was executed and acknowledged, as appears by the record, in due form of law. It was attempted by defendant to show that the acknowledgment of Mrs. Shear was not taken by the magistrate upon a private examination of the wife separate and apart from her husband, and that no private examination was had, but that the grantors signed the instrument and the Justice signed the certificate, only asking the wife, at the same table and seated by her husband where they had signed the paper, whether she knew what she was doing? She answered, yes, she thought she did. The Justice then signed the certificate of acknowledgment. Mr. and Mrs. Shear testify that there was no separate or private exami-

nation. It has been repeatedly held that the certificate of acknowledgment of a deed of a married woman is conclusive, unless fraud be clearly shown by competent witnesses; and that the testimony of the parties alone was not sufficient to overcome the certificate, nor would the testimony of the magistrate be taken to contradict his official certificate. In Johnston vs. Wallace, 35 Miss., 331, the court says: "Whether the officer taking an acknowledgment acts judicially, or quasi judicially, or both judicially and ministerially, he is the person to whom our law, in the effort to protect married women from the coercion of husbands in the execution of deeds, intrusts the duty of ascertaining by her declaration made apart from her husband that she has acted freely in executing the deed acknowledged; and when a married woman has appeared before a proper officer, having signed a deed and acknowledged it, he certifies a full compliance with the statute, his certificate, except in cases of fraud, must be held conclusive of the facts which it asserts. Any other rule would open wide the door for fraud upon the grantees of married women. * * * There is far more danger that deeds of married women will be improperly sought to be set aside, if it can be done by questioning the *manner* of acknowledging them, than that wives will be imposed on in acknowledging deeds." See also Heeter vs. Glasgow, 79 Pa. St., 79; Kerr vs. Russell, 69 Ill., 666; White vs. Graves, 107 Mass., 325; Singer Mfg. Co. vs. Rook, 84 Pa. St., 442; 1 H. & McH., 211; 3 ib., 321; 2 Pick., 184.

In Heeter vs. Glasgow, the court says: "The true rule deducible from the authorities is, that the certificate of the Justice of the acknowledgment of a deed or mortgage is a judicial act, and in the absence of fraud or duress, conclusive as to the facts therein stated. A purchaser, *bona fide*, and without notice of the fraud, is protected against it; but

as to all other persons parol evidence has been admitted to show fraud or duress connected with the acknowledgment." The same question was considered by this court at the present term in Hart vs. L'Engle, *et al.*, in which it was held that a wife's acknowledgment of relinquishment of dower cannot be impeached by her testimony alone, but, though it may be impeached for fraud, the proof to sustain the charge must be of the clearest, strongest and most convincing character.

In the present case Mrs. Shear does not repudiate the execution or acknowledgment of the deed, either upon the ground of fraud, forgery or duress, and we must give to the magistrate's attestation its legal effect as it stands.

V. The next and more important question is as to the character of the deed of January 4, 1878. Mrs. Shear sought Robinson in great distress to aid her in a small way in her pecuniary affairs. Afterwards she sought more aid, and excited his sympathies in her behalf to the end that he made advances and assumed obligations for her to the extent of $1,590, for which he took her note payable immediately, and took the mortgage of August 1, 1877, for $2,000, consenting to make further advances up to the latter amount. At the same time he took a lease for five years of her plantation and all the personal property upon it, and entered into possession under this lease, Mrs. Shear remaining in the house with her family, and with no means of support beyond the small amount of rent. Mr. Robinson then made further advances, beyond the maximum of his mortgage security, the amount in November or December, 1877, being $836.91 in excess of the amount secured by the mortgage.

It is difficult to determine at this point which party was most anxious to increase the amount of petitioner's advances to Mrs. Shear. Now commenced the negotiations

which resulted in the deed of January 4 and the foreclosure proceedings.

It seems to have been concluded that Robinson should advance or pay $500 more, which with previous advances or credits amounted to $3,336.91, and which he says was the price agreed on for an absolute sale and deed of the entire property, real and personal. She insists that though the conveyance executed by her and her husband was in the form of a deed of conveyance, yet it was the understanding and agreement that the conveyance was made to secure him the money, and that she had the right to redeem the property at any time by paying the amount.

She says the paper in the record bearing the date of January 10 was in fact given her by Robinson the same evening the deed was executed. He says it was given some days later in response to a distinct proposition from Mrs. Shear. The paper in evidence was not the original actually signed in January, but is a substantial copy of the original, and was made by Robinson at Cedar Key in June, copied from the orignial which had been wet and discolored, and the original was then and there destroyed by him. In view of the entire facts of the case it is unfortunate this original paper was destroyed by him at a time when he was treating with them in the absence of counsel for important admissions, in regard to this controversy, because if it were produced it would have avoided the dispute as to the day as well as the terms of the engagement. At all events, the paper contains the essence of Mrs. Shear's construction of the deed if it was given at the time of the execution of the deed, but if it was an independent agreement it is of no binding value as a contract for the sale of land, as it is without consideration or seal or mutuality of obligation, a mere naked proposition.

Her position here is that she claims that the deed was a security for her entire indebtedness and the five hundred

dollars then advanced to enable her to go elsewhere to seek a livelihood, and that she was entitled in equity to redeem by paying the amount stated, and is therefore entitled to the surplus bid over that amount on the foreclosure sale.

If the deed of January 4, 1878, was the result of an absolute sale of the property, it is difficult to conceive of any plausible reason for the foreclosure of the mortgage. If the grantors conveyed all their interest, there remained no interest to be cut off by the foreclosure. The foreclosure could not affect the rights of creditors or incumbrancers of any sort, because the mortgagors only are the defendants named in the foreclosure suit.

It is undisputed that Judge Baker, who drafted the deed and the bill of foreclosure, understood from the parties a month before the date of the deed that the transaction contemplated was an absolute sale and conveyance. He sent the draft of the deed and the bill from Orange county to Robinson, who sent them, and they were delivered, to Mrs. Shear to be examined before closing the transaction.

The introductory part of the deed reads: that "whereas the said E. E. Shear and L. N. Shear are unable to comply with the terms of said mortgage, or to pay the said sum of money secured thereby, and they being willing and anxious to secure said payments," therefore, in consideration of the premises and the sum now due by the mortgage, and the further consideration of $1,746.91 paid by Robinson, they granted the property in fee, &c. Then the bil of foreclosure, which was sworn to by Robinson on the 3d of January, 1878, the day before the execution of the deed, states the execution of the mortgage to secure the note of $1,590, and that he had "agreed to assume certain other indebtedness and to make further advances, which have since been made, amounting to the further sum of $1,746.91;" and that the defendants have never repaid any part of *said indebtedness,*

and the whole amount is *now justly due,* and that a sale of the property is necessary *for the raising of the money,* &c.; therefore he prays a decree forever barring and foreclosing the defendants of all right, title, interest or equity of redemption, and for a decree for said amount and execution thereon, and a sale of the property; and that out of the proceeds the costs to be paid,next the amount of the principal and interest of complainant's claim, *"and the balance, if any, be paid to the defendant, Eliza E.Shear, to her sole and separate use."*

An answer was also sent to Mrs. Shear to be examined and signed, already prepared, by Robinson or his counsel, acknowledging that she *was indebted,* as charged in the bill, in the sum of $3,336.91, including the note; and defendants therefore *assent to the decree as prayed for by the bill.* This answer was signed at the same time with the deed, January 4th.

Now, with this bill informing Mrs. Shear that the whole amount of the consideration of the deed was an indebtedness, claiming that the property must be sold to pay him the amount so due him, which they are otherwise unable to pay, claiming a decree that this debt be paid out of the proceeds of a sale, and that any surplus over this amount be paid to Mrs. Shear "to her separate use," and this bill sworn to by Robinson, and an answer given her to sign and swear to, and which was sworn to by her in presence of Robinson, stating that the $3,336.91 was an indebtedness to be paid by sale of the mortgaged property, and that she would be entitled to any surplus after paying this amount from the proceeds of the sale, how does it lay in the power of Robinson to say that she did not understand the effect of the deed to be precisely what she now claims, a security for the whole indebtedness mentioned, for a part on which Robinson, up to the date of the deed, had no se-

curity whatever? Mrs. Shear signed that deed with these papers before her, prepared for and furnished to her by Robinson, so that she could understand what she was doing and what was the professed object and effect of such deed upon her rights in the property. If the effect of the deed was intended by Robinson to be other than that she was so made to understand; if the sworn bill stated a lie, and she was induced and invited to sign and swear to an answer which he now claims is a lie, then he is guilty of a gross fraud upon Mrs. Shear which will avoid the deed as so much waste paper. Robinson says now in his testimony that he did not read the bill. He is estopped from this plea of ignorance by having signed and sworn to it, and by having induced the defendants to consent to a decree in accordance with the prayer of the bill.

Again, in furtherance of the prayer of the bill and the submission in the answer that such decree be made as the bill prayed for, Robinson took a decree that the property be sold and that he be paid the indebtedness of $3,336.91 and costs, and that the surplus, if any, arising out of the sale, be paid to the defendants. And it was further provided in that decree that if the property should not sell for money enough to pay the $3,336.91 with interest and costs, there should be execution against the defendants for the deficiency.

What does this mean? It is evident that Robinson's attorneys and solicitors, who drew the deed and the bill and the answer and the decree, intended to do precisely what was done in accomplishing the purposes and establishing the rights of the parties by the most solemn and deliberate forms and methods.

The only conclusion to be drawn from all the reliable facts in the case is that the deed of January 4, 1878, was in its legitimate effect and purpose, and in its execution was

intended to be, a security for the sum of $3,336,91, owing by the grantor to the grantee, and that as between these parties it must be given such effect. Such, indeed, is the result of the adjudication by which the decree of foreclosure was intended by consent or agreement of these parties, and establishing their several rights. In Glover vs. Payne, 19 Wend., 518, the court says: "Had it appeared that the deed was given to secure a pre-existing debt or a loan of money, or that the consideration paid for the land was greatly below its real value, a question would arise whether it was not a mortgage." (In that case the grantor had. after the execution of a deed, taken a lease from the grantee.)

The circumstance that there was no personal security taken for the payment of the money does not make the conveyance less effectual as a mortgage. (Russell vs. Southard, 12 How., 139, 152, and citations.) Brown vs. Dewey, 1 Sandf. Ch., 56, reviews the cases and shows that the absence of personal liability of the grantor to pay is not conclusive to determine whether the conveyance is a mortgage.

Speaking of a conveyance by the mortgagor to the mortgagee of his equity of redemption, the court in Russell vs. Southard says: "We think that inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter be in needy circumstances, the purchase by the former of the equity of redemption is to be carefully scrutinized when fraud is charged, and that only constructive fraud or an unconscientious advantage which ought not to be retained, need be shown to avoid such a purchase. * * * A mortgagee in possession may take a release of the equity of redemption. But such a transaction is to be scrutinized to see whether any advantage has been taken of the mort-

gagor; especially is this necessary when the mortgagee in the inception and throughout the whole conduct of the business has shown himself ready and skilful to take advantage of the necessities of the borrower." The court cites 2 Schoales & LeFroy, 673, in which Lord Redesdale declares that courts view transactions of that sort between mortgagor and mortgagee with considerable jealousy, and will set aside a conveyance of the equity of redemption where, by the influence of his incumbrances the mortgagee has purchased for less than others would have given.

VI. It is insisted that the petitioner should be relieved of his bid because he was laboring under a misapprehension of the facts of the case. An examination of the record fails to show that he was ignorant of any material fact bearing upon the rights of the parties. The most that can be said is that he did not apprehend the legal and equitable effect of his decree, and that in bidding above the amount of the decree he did not know that he would be, and was advised by counsel that he would not be, required to pay the excess. This is purely a question of law, arising out of facts of which he was fully cognizant.

The presumption is that every person is acquainted with his own rights, provided he has a reasonable opportunity and capacity to know them.

Fonblanque has laid down the general proposition that in courts of equity mere ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts; and in this he is fully borne out by authorities. (1 Story's Eq. Jur., §111, 139.)

It would be superfluous to enter upon a discussion here of this question. Judge Story and the Supreme Court of the United States have so fully examined it and pronounced the rule in view of all the authorities, the question is no longer open.

VII. After the sale under the decree the petitioner went to Cedar Key and sought out the mortgagors. He first found a Justice of the Peace and informed him that he should require his services in certifying some papers which the Shears would execute when Mrs. Shear should return. The time was fixed at nine o'clock P. M. Robinson said he had the papers all ready, but had not then seen Mrs. Shear. At ten o'clock Robinson sent for Lutterloh, the Justice, and he went to Mrs. Shear's door, and Robinson met him and said he was not ready, and he wanted to have "some further conversation with these people." At half-past eleven Lutterloh was again sent for, and met the parties, and Robinson commenced reading the paper, explaining as he read, and convinced Lutterloh as well as the Shears that they had no rights in the matter whatever that could be enforced in law or equity, and that their honor and reputation required that they should sign the paper. What Robinson had previously said to Mr. and Mrs. Shear Lutterloh does not know. Delia Burkhim testifies that Robinson said all he wanted was the money they owed him. This was when R. copied and signed the paper called the agreement to sell.

Robinson paid the Shears on that occasion one hundred dollars, and took from them a receipt commencing "whereas, in the purchase of W. L. Robinson from us of the land and property described in the deed of January 4, 1878, by agreement the said Robinson did retain for his protection in case he had to pay a certain claim of Dr. John S. Bond; and, whereas, being in need of funds, we have applied to said Robinson to pay us $100, and he has paid the same to us this day," &c.; and the paper further stipulates that they will refund the money to Robinson in case he shall pay the money to Dr. Bond.

Mr. and Mrs. Shear state in detail the reasons why they

signed the paper at Cedar Key consenting to the execution of a deed and relieving R. from paying his bill, &c. Their statement is more full in regard to his representations to them of what had transpired at the sale than Robinson gives in his testimony. They say that Robinson told them that Hopkins and Walker and Williams were engaged in a black-mailing operation to defraud him; that Williams' bid was the mere act of an enemy to annoy him; that Judge White had decided they had no rights, and counsel had given opinoins to the same effect, and they gave their assent to the paper to save Robinson from being cheated and defrauded, as they were led to believe, and to save their own honor and reputation, which R. said was being injured by the conduct of Hopkins, Walker and Williams. They further say that parts of said paper were not read to them by Robinson, who pretended to read it to them. The Shears had no counsel or advisers, were very poor and in desperate circumstances, to whom $100 was a great relief, and it appears by the testimony of several witnesses that they were mentally incapable of managing important business affairs.

It would be doing violence to equity and good conscience to hold them to the provisions of that paper under the circumstance in which they were induced to sign it; their ignorance of the facts, their weakness, the impressions made upon them during the several hours Robinson spent with them in the night in the absence of counsel or friends, and the legal and equitable rights intended to be affected by it. If the Shears had an interest in the surplus money it would certainly be inequitable that Robinson should deprive them of it by any means whatever without their intelligent concurrence. 1 Story's Eq. Jur., Sec. 128; 1 Peters, 15, 16.

VIII. Another reason given by the petitioner why he should be relieved of his bid is that the property is not

worth it, and not worth more that the amount named in the deed; that Williams run up the price in bad faith and for the purpose of annoying aim. It does not appear by the testimony of the several respectable witnesses that the land and improvements were worth less than the amount bid. Some estimate them at a higher and others at a less amount. The fact remains that Robinson refused to accept a bid of $7,900 and bid higher himself. Judge Bernard and Mr. Perkins heard Williams say that he would not have bid it up if Robinson had paid him one or two hundred dollars. Williams says, however, he was bidding for the purpose of buying, and was ready and willing to buy and pay for the property. Other witnesses state facts showing Williams' intention and ability to become a purchaser at the amount of his bid. What Williams may have said in jest or in earnest afterward does not affect the fact that he was a responsible bidder. Nor do we see why such a bidder should "annoy" Robinson, while he was at all times professing to be unable to spare from his business the money he had invested and assumed to pay for the Shears. It would be very natural to conclude that Robinson, instead of being annoyed, would be rejoiced at the opportunity of doubling his investment in a few months, and if not for his own sole benefit, at least to the advantage of the unfortunate people in whose behalf his sympathies had been so actively aroused. He persists that the property is not worth more than he has invested, but a better test of his estimate of its value is his refusal of $7,900 for it.

These conclusions are the result of a careful and patient examination of the voluminous record laid before us and of the authorities at hand. The decree setting aside the sale must be reversed and the case remanded, with directions that further proceedings be had therein in accordance with this opinion and the practice of the court.

Shear v. Robinson—Petition for Rehearing.

Leave having been obtained at the January Term, 1881, at which the foregoing opinion was rendered, the appellee filed, within thirty days after the adjournment, the following petition for a rehearing:

The appellee respectfully asks for a rehearing in this cause, and in support thereof submits the following:

I. It is held by the court that "the only conclusion to be drawn from all the reliable facts in the case is that the deed of January 4, 1878, was in its legitimate effect and purpose, and in its execution was intended to be, a security for the sum of $3,336.91-100 owing by the grantor to the grantee, and that as between these parties it must be given this effect." In this the petitioner respectfully submits there is error. Judge Baker who drew the deed says that he was employed to act for both parties in drawing an absolute conveyance; he had full consultation with them, together and separately, and each understood that an absolute sale of the property was to be made, and he prepared the paper for this purpose, and as an absolute conveyance. In the opinion of your Honors, prepared by the Chief-Justice, it is expressly stated that "it is undisputed that Judge Baker who drafted the deed understood from the parties a month before the date of the deed that the transaction contemplated was an absolute sale and conveyance. He sent the draft of the deed and the bill from Orange county to Robinson, who sent them and they were delivered to Mrs. Shear to be examined before closing the transaction." There is no doubt, unless Judge Baker is not to be believed, and certainly I am justified by the above quotation in saying the court believes him, that both parties up to their last interview with him, or his last interview with either of them, intended an absolute conveyance, yet notwithstanding Judge Baker's testimony as to interviews with them together and separately, and the understanding

and instructions communicated to him, Mrs. Shear says it was on the 4th of January, 1878, at Glenwood, at the signing of the papers, that Robinson *first informed her that* the paper he wished her to sign was a bill of sale, and not an agreement to foreclose the mortgage. I understand Mrs. Shear as meaning by the statement that she had never heard from Robinson, or had with him any agreement to execute an absolute conveyance. If Mrs. Shear is to be believed then Judge Baker is not to be relied on; but it is too clear that Judge Baker is to be believed and Mrs. Shear not to be, as to the arrangements agreed on. It is clear also that the papers executed, including the foreclosure proceedings, were prepared and sent by Baker as the agencies for perfecting the title in Robinson. Robinson understands them so; when he goes to Glenwood to have them executed he expresses the same understanding which he had always had. To hold that the deed was in its execution intended to be a security for the purposes stated is to rely upon a part of Mrs. Shear's testimony, who has certainly not spoken the truth as to another stage of the negotiations, if Baker is to be given the credence accorded to him and merited by him. The petitioner respectfully submits that even if any credence is to be given to Mrs. Shear's statements as to the negotiations at Glenwood on the day mentioned, the effect of her testimony is not that the transaction was a security for merely the $3,336.91-100, or this sum and interest, for the agreement she claims to have been given to her by petitioner on that day, as set out by her, (pages 400, 401,) is an agreement of petitioner to sell to her for $3,336, "with interest and full value for any improvements, with interest at 16 per cent." Mrs. Shear is either to be believed or not to be believed. If the former, then her understanding and agreement was not that she could get back the property by paying the

$3,336 or $3,336.91 and interest, but by paying him one of these amounts and interest and the full value of improvements and interest. The interest to be at the rate of 16 per cent. There can be no doubt that Robinson understood that he was to get the absolute title, unless Mrs. Shear is to be believed, and if she is to be believed then he was to have the legal title, subject, however to an agreement to sell to her, not for the debt and interest but for these and additional consideration, the full value of all improvements. She could not, according to her own testimony, claim the property upon paying the $3,336.91 and interest; nor should be allowed to claim the proceeds of the property over and above the same amount. Although the bill and answer were drawn as they were, yet in the point of fact, taking Mrs. Shear's testimony and believing it as a whole, (and it is to be believed as such or not at all) and assuming she had carefully read all the papers, Robinson was then expecting and claiming an absolute conveyance, and believing the papers Baker had drawn would secure it to him. Whether Baker or Bernard originally suggested the foreclosure, he "concurred in the opinion for the reason that there was a prior mortgage which Robinson had paid, and it was thought best to foreclose against all persons claiming by, through or under Mrs. Shear in order to perfect the title under the absolute deed from Mrs. Shear to Robinson." and after Robinson consulted Judge Bernard, who had been his attorney in other business, he (Baker) said to Robinson that he saw no necessity for immediate foreclosure of the mortgage; that he considered the deed he was instructed to prepare a sufficient title to the property, but that as Alexander & Maxwell held a prior mortgage, but transferred to Robinson or purchased by him, he (B.) concurred with Judge Bernard that a foreclosure of the mortgage to Robinson was the safest mode of extinguishing

all prior incumbrances." The purpose of Mr. Baker in advising it, however mistaken it may have been and however crudely carried out, was not that it was necessary as between the grantee and the grantor, but as to third parties; that as to these the mortgage should be kept alive. It is competent for one to purchase of his mortgagor the legal title and still keep his mortgage alive and foreclose it against other lien holders. The courts, in the absence of evidence of express intention to keep it alive or not, will look to the interest of the purchaser, and assume that he so intended if it appears to be to his interest to do so. With proper deference it is with confidence asserted that the testimony carefully considered shows that neither Mrs. Shear nor Robinson understood or intended at the execution of the papers on the 4th of January, that the deed was or should he a security as stated and found by your Honors, but to say the most for Mrs. Shear it was at least intended as a conveyance to Robinson of the legal title,a satisfaction of her debt to him, and that the other paper should give Mrs. Shear the right to repurchase on the terms therein stated. In view of all the testimony it cannot be believed that Robinson would have permitted the commencement of the foreclosure proceedings if he had not understood they would have the effect sought to be given them;nor that Mrs. Shear when she signed the papers believed they would have such effect. The fact that the Shears never made or attempted to make any arrangements for having some one look after her interests at the sale when she left Tallahassee, goes of itself to show that she did not regard herself as having any interest in the property, unless through a right to purchase it back under the terms stated in the additional paper referred to.

Why, if Robinson or Baker intended or understood the deed of January 4 as a security, was it not foreclosed in-

stead of the old mortgage? The foreclosure proceeding is, we respectfully submit, accounted for by Baker. It is a thing Robinson would never have suggested himself as a means of getting title. It is a proceeding, however crude, which on its face shows that a lawyer advised it and not a layman.

II. With proper respect petitioner believes and urges that it is error in the court to hold that he in bidding acted under mere mistake of law. (Story's Equity Jurisprudence, §141). He believed as a matter of fact that the ownership of the property as against the Shears was in him. He had negotiated to this end, and believed it to be consummated. Robinson cannot be said to have acted solely on Mr. Bernard's advice as to bidding. He was also acting on the belief that in bidding he was carrying out the purpose of both parties, a belief made strong by the dealings between him and the Shears, and by the opinion and advice of the chosen counsel of both parties.

Moreover it is not always the case that equity will refuse to grant relief against a mistake of law. If it be a mistake of law it cannot be said to arise from a mere misapprehension to the effect of the decree, for he was not relying solely on the foreclosure proceedings; in fact the foreclosure proceedings in the light of Baker's advice were not instituted for the purpose of having any effect as between him and the Shears. 8 Wheaton, 211-16; Kerr on Fraud and Mistake; Story Eq. Jurisprudence.

III. In regard to the transactions at Cedar Key, Robinson and the Shears differ in their statements as to some features, but looking to the testimony of Lutterloh. who was with them for two hours, and to its statements of facts as contradistinguished from mere opinions, we find that Robinson there claimed that he had form-

erly bought the land, and that the Shears did not deny it. Miss Burkhim's testimony that Robinson said all he wanted was the money they owed him, taken in connection with the paper before him, can bear no other reasonable interpretation than that he meant that the money which would be payable to him under that paper would satisfy him and secure a return of the property. Robinson denies the statements as to Hopkins and Walker imputed to him by the Shears. He does state that they were interfering and trying to make him pay that which he had never expected to pay, and it is clearly shown by the testimony that the knowledge of Hopkins' interference was the cause of Robinson going to Cedar Key. Robinson further says that Williams had run the property up on him, and Robinson's testimony shows that when he was bidding he believed that Williams was not bidding in good faith but to annoy him. As to the Shears signing the paper to save Robinson from being cheated and defrauded, "as they were led to believe, and to save their own honor and reputation," it is clearly shown that they did not deny that Robinson had previously purchased the property from them, and that they understood that Robinson was to be released from the payment of the balance of the bid over and above the purchase price named in the decree, which was to be credited on the decree. Whether the paper dated January 10, 1878, was executed on the 4th or 10th, Robinson believed it to be binding upon him, and he believed, and so did they, that he had become the purchaser in January from them, and the great purpose of the paper executed at Cedar Key was to secure a release from the bid which he had made on the property he naturally believed, and they admitted, to be his. As to not reading all the paper to them, this Robinson denies.

As to the Shears having "had no counsel or advisers,"

and being "very poor and in desperate circumstances to whom $100 was a great relief," the interference of one of their counsel before this court was the cause of Robinson going to Cedar Key. His letter had advised them that they could claim the money over and above the amount of the decree. Right here it is to be observed that there is no denial on the part of the Shears of their having written Mr. Hopkins the letter which plainly tells him they can attend to their own business and he to his. There is no denial of Robinson's statements as to what passed or occurred as to Mr. Hopkins. They had been advised of Mr. Hopkins' views of their legal right to the excess of the bid. In view of the letter of Mr. Hopkins can it be said they were without counsel or advisers? The $100 was, as the Shears says, not paid in the consideration of the execution of the instrument signed by the Shears. It was not mentioned till after the execution of the paper by the Shears. The renewal of the paper of January 10 at Cedar Key and was requested by the Shears,on account of its stained condition. There is nothing to show that Robinson had sought or suggested such a thing. The destruction of the old paper is what any sensible man would have done. Certainly it would not have been business-like or reasonable to leave both outstanding. The only substantial difference, Mrs. Shear alleges, between the renewal and the original is two per cent. interest. This change Robinson denies, as he does all others. There is no witness to the contrary but Mrs. Shear.

Robinson's conduct in going to a Justice of the Peace on his getting to Cedar Key is alluded to by the court. In transacting the business there he had either to do it secretly or openly. Had he introduced no witnesses to such transactions the secrecy native to fraud would have been imputable to him. Had he, when the witnesses were present,

had no conversation or explanation with the Shears before them, but only a reading of the papers, or had he enjoined any secrecy on them, there would have been circumstances usually indicating fraud. There is no testimony by the witnesses to a single substantive act of fraud, or circumstance ordinarily showing fraud, upon the part of Robinson. Mrs. Shear has pronounced everything a fraud, it is true, from beginning to the end, but it is confidently submitted that she is not to be believed. Nothing is plainer than that she applied to Baker, and separately and with Robinson instructed and advised Baker that an absolute sale was intended, yet she swears that Robinson never said anything to her about an absolute conveyance until Janury 4, 1878. "*Falsus in uno, falsus in omnibus.*" Robinson's acts at Cedar Key shows no intention to obviate the agreement to permit Mrs. Shear to purchase. Had such been his intention, he would have desired and attempted to take up instead of renewing the agreement of January 10th. We respectfully submit that the conclusion of the court as to the transactions here are not borne out by the testimony.

IV. We respectfully submit that the court has erred as to the value of the land and property as shown by the testimony. The great weight of the testimony is with Robinson in asserting the property is not worth the bid. Pearce and Houstoun do not get square down to the question as to what his land is worth. Pearce says the committee agreed not to put a fixed value on it, and what he would take for his own land. Houstoun's idea is that land which brings so much is worth so much. The fact that Robinson refused to accept the Williams bid of $7,900 is taken hold of by the court as a strong circumstance of his valuation of the property. The testimony shows that Robinson regarded his agreement of January 10th as one to be kept; that was regarding it in his bidding, and that it was his d

under it bid in the property and secure the Shears the privilege of availing themselves of that agreement. He had never shown any disposition to evade or break it. They say that under it they were to have the privilege for at least five years of repurchasing. He had made great improvements on the place, and the agreement provided for his being repaid for them as well as the Shears getting these improvements at their cost and interest in case they repurchased. Even admitting this agreement was not executed till January 10th, and was not binding on him, still he believed it was, the Shears believed it, and he acted on it, and in bidding he was doing so as much for the Shears as for himself. In asking for the sale to be set aside Robinson is seeking nothing that the Shears did not contemplate when they took the agreement. If not set aside, is he to lose all the benefits of his improvements? Is it natural to suppose that Robinson would have made any improvements if he had understood that he was merely securing the $3,336.91-100 when the papers of January 4th and 10th were executed? Robinson has not broken faith with the Shears. He has stood ready to carry out the agreement of January 10th, and merely desires that the Shears will stand to it and not break faith with him. For the Shears to insist upon anything else is, we respectfully submit, fraud in them, and Robinson is but seeking to carry out the agreement which they say was made in good faith.

In consideration of the premises, your petitioner prays that he may be fully reheard upon the points above stated, and to that end and that full justice may prevail your Honors will grant a rehearing, and, as in duty bound, yonr petitioner will ever pray.

GEO. P. RANEY,
Solicitor for Petitioner.

At the June Term, A. D. 1881, the following opinion denying a rehearing was delivered by the CHIEF-JUSTICE:

The appellee petitions for a rehearing upon several grounds.

1. It is insisted that our conclusion "that the deed of January 4, 1878, was, in its legitimate affect and purpose, and in its execution was intended to be, a security for the sum of $3,336.91, owing by the grantor to the grantee, and that as between these parties it must be given this effect," was erroneous and not supported by the law and the facts.

It cannot be expected that we shall recapitulate all the salient points of the testimony in deciding upon this petition. In the opinion already given we announced the conclusions arrived at upon a view of all the facts upon the equitable rights of these parties.

Upon a patient review of all the testimony we have failed to reach any different conclusion. The testimony of Bolling Baker leads to the conclusion that, according to his understanding of the parties, the Shears were to give Robinson a deed conveying to him a title in fee simple. Robinson says that was the intention of the parties. Mrs. Shear insists from the first to last that the purpose of the deed was, whatever the form of the conveyance, to relieve herself from the embarrassment of her situation, to provide that her other creditors should be paid, that Robinson should be paid, and that whenever the property should be sold she might have the benefit of any advantageous sale. Baker's last interview with the parties resulted in his drawing up and forwarding to Mr. Robinson the deed and the bill of foreclosure. These papers, after Robinson had made oath to the bill, were sent to Mrs. Shear to read, and these papers are, as they bear upon each other, when signed, the highest evidence of the agreement of the parties. The peculiar language reciting the consideration of the deed of convey-

ance (as before quoted) may well have given Mrs. Shear the idea that it was carrying out an intention to "secure" the payment of money which she could not then pay. Its language is, "being willing and anxious to secure said payments," referring to the mortgage indebtedness of $1,590, "and in consideration of the premises tnd the sum now due by said mortgage, and the further consideration of $1,746.91 paid," &c., the grantors convey the property, real and personal, in fee. Then, as we before remarked, the bill of foreclosure which he had sworn to alleged that the sums of $1,590 and $1,746.91 were a subsisting indebtedness; that it had never been paid, "and that the whole amount is now justly due," &c.; and then asks the court to decree a sale for the purpose of satisfying such indebtedness; and that after paying the money so due to Robinson the residue of the proceeds be paid to Mrs. Shear "to her sole and separate use." Then the answer furnished by Robinson was before her, admitting all the allegations in the bill and joining in the prayer for such decree, which she was, in view of her understanding of the transaction, willing to swear to, and did swear to in his presence before a Justice of the Peace brought there by him for the purpose.

What avails it that there had been an agreement to sell the entire property for the amount due him? Here is the entire agreement between the parties reduced to writing and sworn to by both parties. What was in her mind on reading and signing these papers except that they expressed her intention, and his at the moment of the consummation and without forgetting what she says was the first intimation as to a "bill of sale" in the early part of the interview, the true character of the contract as closed by the signatures and oaths of both parties, agrees with her testimony in the case.

Judge Baker was not present at this execution of the papers. He understood, according to his testimony, that Mrs. Shear was to sell the property to Robinson. If that was his understanding at the time of preparing the bill and answer, we fail to comprehend him. If, at the time of the execution of the deed by Mrs. Shear and the making oath to the bill and obtaining her answer agreeing to the decree prayed for, he supposed the transaction was merely a conveyance to him in fee, we fail to comprehend him. The facts stated in the bill are true or false. Mrs. Shear says they are true. The bill, answer and decree corroborate her in this respect. If neither of them is to be believed, the case, in the respect of the character of that deed, stands upon the writings executed with it as a part of the transaction and declaring its purpose as unmistakably as though they were written on the same piece of paper.

The paper signed by Robinson only agreeing to sell the property to Mrs. Shear, and which seemed to satisfy her at the time, if not a part of the transaction is of no moment for reasons before stated. The foreclosure of the mortgage may have been intended as one of the agencies for "perfecting the title," but if the title was conveyed by the deed we fail to discover the object of foreclosing and obtaining by the oaths of the parties a decree *judicially establishing* the fact that the expressed consideration of the deed was still a subsisting indebtedness. This cannot be a matter of fraud, accident or mistake.

The suggestion that Mrs. Shear, when she left Tallahassee, made no arrangements to have her interests looked after at the sale goes to show that she did not regard herself as having any interest in the property. Her situation at Cedar Key is shown by the testimony, as is also her capacity for transacting this kind of business. Whether she knew of the time and place of the sale we do not know, but it seems some one informed her afterwards.

II. The second ground of the petitioner is that it was error to hold that in bidding he acted under a mere mistake of law; while in reality he believed the ownership of the property was in himsef; that he did not act solely on the advice of his counsel as to bidding: he was also acting on the belief that in bidding he was carrying out the purpose of both parties, a belief made strong by the dealings between himself and the Shears, and by the opinion and advice of the counsel of both parties.

All which means that he was bidding under an impression that the Shears had no interest, while his decree informed him that he was enforcing a subsisting indebtedness, and that his deed was a security for the money. We do not see that he was ignorant or misinformed of any fact whatever upon which his whole conduct or action was based.

It was stated in the opinion that as a general rule equity would not relieve from the legal consequences of acts under a mistake or ignorance of law. True we did not state that there are exceptions to this rule in so many words, but said in the language of the books that the presumption is that every person is acquainted with his own rights, provided he has a reasonable opportunity to know them. (1 Story's Eq. Jur., §111.)

In Cullen vs. Ready, 2 Atk., 591, Lord Hardewick says: "It is said they might know the fact, and yet not know the consequence in law, but if parties are entering into an agreement and the very will out of which the forfeiture arose is lying before *them and their counsel* while the drafts are preparing, the parties shall be supposed to be acquainted with consequence of law to this point, and shall not be relieved under a pretence of being surprised, with such strong circumstances attending it."

Chancellor Kent, in Storrs vs. Baker, 6 Johns. Ch., 169,

"It is rarely that a mistake in point of law, with a knowledge of all the facts, can afford ground of relief, considered as a sufficient indemnity against the injuconsequences of deception practiced upon mankind. * vould seem therefore to be a wise principle of policy t ignorance of the law, with knowledge of the facts, can- generally be set up as a defence."

There is a class of cases cited in Story's Eq. Jur. and in Kerr on Fraud and Mistake, p. 399, *et seq.*, where persons have entered into agreements and there was a mutual misapprehension or ignorance of legal rights; or where one party had imposed upon another by misrepresenting or concealing the existence of legal rights; or where a person supposing himself liable, through ignorance of law, had assumed a liability; or where one gave up a good security for another which was viod; or where a sister, being ignorant of her rights under a settlement, released her rights to a brother; or where a daughter accepted a legacy and released her orphanage which was much more valuable; and like cases, the result of imbecility or gross improvidence or imposition, each case depending upon its peculiar circumstances, equity has given relief.

"Upon a close survey," says Story, (1 Eq. Jur., §120,) "many, although not all of the cases, [where the party, knowing all the facts, has acted upon a mistake of the law,] will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief." And where an instrument was acknowledged to have been entirely misunderstood by both parties to it, equity may afford relief. 8 Wheaton, 216.

We find no rule announced by the courts which gives ground for relieving the petitioner from the burden assumed by him, under the circumstances of this case, upon the ground of mistake.

As to the transaction at Cedar Key we think, upon a review of the testimony, that the conclusion of the court were correct. The signing of the paper there by the Shears was, considering their condition and all the circumstances preceding it, not such an act of deliberation and freedom from the influence of their peculiar condition as to commend it to the conscience of the court as one determining any material, legal or equitable rights. Several hours of the night were spent by Robinson with them before they were induced or persuaded to assent to the signing of a paper prepared in advance for them by his counsel, and not as the result of conference in which they should have had the aid of prudent counsel. Nor was any one present with them, but after the long private conference in which they agreed to sign the paper, the magistrate and witnesses were admitted and the paper then signed and attested as stated in the former opinion. And we perceive no reason for refusing to believe the testimony of Mr. and Mrs. Shear and for giving credence alone to that of Robinson as to what transpired between them alone.

IV. The fourth point made is in regard to the value of the land and other property. As to the value of the land, while some of the witnesses did not fix any definite money value, yet their comparison of it with other lands in the vicinity and their value give a fair means of estimating it. Taking in this connection the house, outbuildings, farming tools, wagons, carriages and appurtenances, pictures, books, ornaments and furniture, Mr. Robinson's estimate of the value at the time of sale, refusing to let it go at $7,900, is a better criterion by which to judge it.

That his object was to give the Shears the privilege of purchasing it from him on the terms mentioned in the memorandum he had given to Mrs. Shear, and for this reason he refused to sell to Williams, (who was a responsible bidder even if he did desire to "annoy" Robinson by endeavoring to purchase is not substantial or plausible.

If his desire was that Mrs. Shear should have the benefit of the market value of the property, over and above the amount due and interest and value of his improvements, there and then was the opportunity to befriend them by selling for a good price property which he now says he did not consider worth the amount of that bid. His expressed desire was to be reimbursed, and that Mrs. Shear might be benefited by the opportunity to purchase, or to find a purchaser on the terms named in the memorandum. The opportunity presented itself, and he declined to give them the benefit which he admits they were equitably entitled to.

While the case was pending on petition for rehearing there was a motion for the appointment of a receiver of the property, but it was denied.

The following decree was entered: (2 Daw. Ch. Pl. & Pr., Cooper's Ed., 1,282; Harding vs. Harding, 4 Mylne & Craig, 514; Saunders vs. Gray, ib.; Tanner vs. Radford, ib., 515,524.) The appellee having by leave of the court filed his petition for a rehearing of this cause, and the court having duly considered the same, it is ordered that the said petition be denied. And thereupon it is ordered, adjudged and decreed that the order and decree made by the referee in this cause setting aside the sale of the mortgaged premises, be and the same is reversed and set aside, and that this cause be remanded to the Circuit Court for the county of Leon, with directions that a decree be entered in said cause that the said William L. Robinson, within

thirty days after the entry of said decree, be required to pay to the master, W. K. Beard, or to such other master as may be appointed, the balance of the purchase-money bid by him at the sale of said property, after deducting the amount due to him under the original decree, which amount shall be ascertained by said master, and interest at the rate of eight per cent. per annum upon said balance from the date of said sale. Whereupon the said sale will stand confirmed, and said master is directed upon such payment to make deeds to said Robinson of all said real and personal property, but that should said Robinson fail to pay said master said sums of money in the time above specified, said master shall sell all said real and personal property in the manner directed by the said original decree for cash, to be paid on the day of sale, and that the said sale shall be at the risk of the said Robinson, and if the highest bidder at said sale shall fail then and there immediately to pay the purchase-money the master may reject said bid and sell said property again, or postpone the sale to some other day, and that said master is directed to deliver to the purchaser when he shall have complied with his purchase all of said property. And that said master, with the proceeds of said resale pay first the costs incurred since the filing of said petition to set aside the sale,including the costs adjudged against said Robinson in the Supreme Court, and the remainder towards the payment and satisfaction of said amount which shall be found by said master to be due Eliza E. Shear by the effect of said original decree, and interest as aforesaid, by deducting from the amount of Robinson's bid of $8,000 the amount due to him at the time of said sale, and if there should not be enough for that purpose, that execution be issued against the said Robinson for any balance that may remain after applying said proceeds, to be levied as other executions at law, and that

should there be a surplus over and above the said sum which shall be found due said Eliza E. Shear and said costs, together with interest, the master shall hold said balance subject to the order of the Circuit Court. And that said master, when he shall have fully obeyed this order, forthwith report his doings thereon to the Circuit Court for confirmation, and that such further proceeding be had thereon as are constant with the rules of pleading and practice in chancery in that court and this decree. And it is further ordered by this court that said William L. Robinson be and he is hereby ordered and enjoined that the said personal property be not sold, or in any manner removed or disposed of by him, his servants or agents, until he shall have complied with the terms of the sale made to him by the master by paying the amount found to be due to Mrs. Eliza E. Shear as aforesaid to said master, or until the further order of the Circuit Court.

CHARLES BROWN, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. An allegation in an indictment charging murder by the infliction of a wound upon the body with a dangerous weapon, of which wound death immediately ensued, the words "mortal wound" not being used, is sufficient to warrant a verdict of manslaughter.
2. Whether the words "mortal wound" are necessary in an indictment for murder by wounding to justify a verdict for murder in any of its degrees, the indictment alleging that the deceased died of the wounds, considered.
3. It is not strictly correct to charge a jury that "it is for you to say from all the evidence whether or not the prisoner killed the deceased, and whether, if he did so, there was any fact or circumstance in the case to reduce the killing from murder *to self-defence* or to manslaughter," because the jury are by law authorized to

inquire further whether from the facts proved the killing was justifiable or excusable, and the law excuses or justifies a homicide in cases other than that of self-defence.

4. In defining to a jury the several degrees of homicide and the facts which constitute each as defined by statute, the court should generally also give the exceptions mentioned in the statute, wherein the killing is declared to be justifiable or excusable.

5. Where the testimony upon a charge of homicide is so strong and clear as to preclude the conclusion that the killing was excusable or justifiable, and that a verdict of guilty of manslaughter in the third degree is fully sustained by the evidence, the verdict should not be set aside upon the ground that the Judge did not instruct the jury fully upon the question of justifiable or excusable homicide.

Writ of Error to the Circuit Court for Franklin County.

The facts of the case are stated in the opinion.

John W. Malone for the Plaintiff in Error.

The Attorney-General for The State.

THE CHIEF-JUSTICE delivered the opinion of the court.

Brown was convicted of manslaughter in the third degree under an indictment charging murder.

The indictment charged that the accused, with a premeditated design to effect the death of one Willis Taylor, with a knife inflicted wounds upon the body of Taylor, (upon his abdomen and upon his back,) of which wounds Taylor died on the same day.

The Judge charged the jury (par. 2) that "a sane man is conclusively presumed to contemplate the natural consequences of his own act, and, therefore, the intent of murder with malice aforethought is conclusively inferred from the deliberate use of a deadly weapon, in the absence of opposing evidence. It is for you alone to say from all the evidence whether or not the prisoner killed the deceased, and whether,

if he did so, there was any fact or circumstance in the case to reduce the killing from murder to self-defense or to manslaughter."

It is alleged for error that the wounds are not alleged in the indictment to be "mortal wounds."

Bishop of Crim. Procedure, Vol. 2, §521, says: "Every indictment of this sort must state that the wound was 'mortal;' which is usually done by the use of the adjective, as 'one mortal wound,' &c., and refers to the case of Lad, reported in 1 Leach. Lad was indicted for the murder of a girl nine years old by committing rape upon her. The judges unanimously agreed that the indictment was bad, because it only said he did greviously lacerate and wound, * * * of which laceration and bruises she died, but had omitted to aver 'thereby giving the said F. P. one mortal wound or bruise.'"

In 2 Hawkin's Pleas of the Crown, it is said (Ch. 23, §81) that the count should show the length and breadth of the wound that it may appear to the court that it was mortal: "but it is said that anciently this was not required; and if a man be shot or run through the body with a bullet or sword, &c., it seems sufficient to say that the defendant, with malice, &c., struck the person killed in such a part of his body, and gave hi min such part *mortale vulnus penetrans in et per corpus*, NC., for this *sufficiently shows* that the wound was mortal."

The principal case referred to as authority for the proposition that the words "mortal wounds" must be used in an indictment for murder by wounding or bruising is that of Lad in 1 Leach. It is referred to in every case that treats of the question, (though they are very few,) and it may be said that the rule was established in that case to the satisfaction of many of the Judges.

I am unable to comprehend any reason for such a rule.

Hawkins' P. C. practically repudiates it in the paragraph above quoted. I think if an indictment alleges that one struck another with an axe and cut off his head, of which wound the latter died, it is unnecessary, superfluous and tautological to aver that the wound was "mortal." I think the allegations of the facts of the wounding with the weapon and the death *therefrom* is a sufficient averment that it was a "mortal wound." Hawkins (in Sec. 83) says further: "Yet where the death was caused by divers poisons, wounds, &c., the court may say in general that the party died of the several poisons or wounds above mentioned without saying that he died of any one of them in particular; for, perhaps, the truth of the case might be that none of them alone, but all together, caused the death."

Lord Hale says: "If a man gives another a stroke which, it may be, is not in itself so mortal but that, with good care, he might be cured, yet if he dies with this wound within the year and day it is homicide or murder, as the case is, and so it hath been always ruled. * But if a man receives a wound which is not within itself mortal, but either for want of helpful applications or neglect thereof it turns to a gangrene or fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound, for that wound, though it were not the immediate cause of his death, yet if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so, consequently, is *causa causati.*" 1 Hale P. C., 428. Nor will the neglect or disorder in the person who receives the wound excuse the person who gave it. If the death be owing truly to the wound, it signifies not that the deceased would have recovered under more favorable circumstances, or with more prudent care; the death being the result of

the wound, the party inflicting it must be held responsible for it. (McAlister vs. State, 17 Ala., 434; Roscoe's Cr. Ev., 574; 2 Whar. Cr. Law, §941; State vs. Brantley, 44 Conn., 537; People vs. Steventon, 9 Cal., 273.)

It is unnecessary to multiply authorities to the point. The proof of felonious homicide by wounding is such evidence as shows the infliction of the injury; that the death resulted from it, and that such wounding was unlawful. Proof of these facts to the satisfaction of the jury, with time, place, &c., justifies a verdict of murder or manslaughter, as they view the facts proved. No other *evidence* that the wound was mortal is required. What better allegation that the wound was "mortal" can be required than that the deceased *died of the wound?*

I insist that the rule requiring that, in addition to requiring the statement of the cause and the manner of the death, the further statement that the wound was "mortal" has no authority in the logic of the law. The practice has conformed to the forms prescribed by an ancient court, and been perpetuated by the compilers of form books and precedents; and, in my judgment, the use of the words "mortal wounds" in an indictment for murder by felonious wounding are unnecessary and superfluous, where the indictment alleges a wounding which produces death, and precludes the suggestion that the death was caused by any other means.

I make these suggestions as the result of my own study of the matter and of the adjudged cases. I think also that the same opinion was entertained by Mr. Serjeant Hawkins. (Pleas of the Crown. Vol. 2, Ch. 23, §§81, 83.)

But although the indictment in the case at bar purports to charge the crime of murder, the conviction was for manslaughter.

In Macloon's case (Massachusetts), where the indictment

was for manslaughter by assaulting and beating with sundry weapons upon the head and body of the deceased, and by exposing him to the severities of the weather, wind, rain, frost and cold, and depriving him of food, it was objected that the wounds and other causes of death were not alleged to be "mortal." Mr. Justice Gray, delivering the opinion of the court says: "The objections to the form of the indictment are both answered by the consideration that it is not framed upon the theory that either of the means alleged alone was necessarily the cause of the death, but upon the theory that the blows, the starving and the exposure co-operated to produce it. In such a case it is abundantly established by precedents that it is sufficient to allege that the death resulted from all these means without otherwise alleging either of them to have been mortal, and to prove that it resulted from *any or all of them*." (Com. vs. Macloon and others, 101, Mass., 1, 2, 3.) The court cites in support of this 2 West's Simb., §§301, 308; Weston's case, 3 Inst., 50, 135; Jackson's case, 18 Howell's St. Trials, 1075, 1111; 2 Hawk. C., 23, §83; The King vs. Clark, 1 Brod. & Bing., 473; Com. vs. Stafford, 12 Cush., 619.

Lord Hale, in the language before quoted from Pleas of the Crown, and Roscoe and Russell on Crimes, and other writers cited in the authorities above referred to, all say that whether a wound is necessarily mortal or not mortal, but the man dies by means of gangrene, &c., the intervening causes being superinduced by the wounding, the person giving the wound is guilty of murder or manslaughter or excusable or justifiable homicide, according to the circumstances appearing to the jury. Therefore it would not be true in many cases to allege that the wounds were "mortal," yet the accused would be held guilty of the death because he feloniously inflicted the wound which, though not necessarily mortal, was the cause of it, and he is re-

sponsible for the consequences of his acts unless the testimony shows facts which relieve him of them.

The result is that this indictment, whether good or bad as an indictment for murder, is a good indictment for the crime of manslaughter, of which the accused was found guilty by the jury.

[NOTE.— Since the filing of this opinion we have found the case of The People vs. Judd, 10 Cal., 313, in which the court Field J., thus summarily disposes of the foregoing question: "The allegation that the deceased at the time died of the wound inflicted is a sufficient statement that the wound was mortal." See also People vs. Cronin, 34 Cal., 191, 200.]

The second paragraph of the charge was excepted to. It would be clearly erroneous to say that a "sane man is *conclusively* presumed to contemplate the consequences of his acts" without the qualification that evidence of all the facts attending the act may be considered to remove such presumption. We think the words concluding the sentence, "in the absence of opposing evidence," must have been understood to give the necessary qualification. Those words must be held to qualify the entire sentence in which they are used. The meaning of this portion of the charge then is that in the absence of evidence tending to oppose the presumption that the man does contemplate the natural consequences of his act, the presumption becomes conclusive of the animus. The jury cannot have been misled by the charge in this respect.

The last sentence of the second paragraph of the charge instructs the jury that they may say, from all the evidence in the case, whether, if the prisoner killed the deceased, "there was any fact or circumstance in the case to reduce the killing from murder to self-defence or to manslaughter."

The jury was confined within too narrow limits by this

instruction. They are limited to the inquiry whether they might find facts or circumstances in the case to "reduce the killing from murder to *self-defence* or to manslaughter."

If,under this charge, the jury should find that the offence was not murder, they are confined to the duty of finding a verdict of manslaughter, unless a case of "self-defence" is shown. The statute, however, authorizes the jury to find that a homicide is excusable or justifiable in other instances than that of self-defence.

The same criticism was made in Dukes vs. The State, 14 Fla., 499, 523. Whether this charge, if erroneous, should affect this verdict depends upon the testimony and the law applicable to it.

The third paragraph of the charge excepted to reads as follows:

"If you believe from the evidence that the prisoner killed the deceased with a dangerous weapon, not from a premeditated design, but from the heat of passion aroused by a sudden fight with the deceased, you will find him guilty of manslaughter in the third degree."

The statute (Sec. 14, Ch. III., of the Criminal Code of 1868,) under which this charge was given, has this qualification: "Except such wherein the killing of another herein is declared to be justifiable or excusable."

If there was any feature of the testimony that seemed to require the expression, "from the heat of passion aroused by a sudden fight," it would also seem to be necessary to add the above qualification, "except," &c., because if there was a "sudden fright" the jury should know how far, and in what circumstances, they might feel warranted in giving the prisoner the benefit of the exception, and they ought, in such case, also to be informed under what circumstances a homicide is justifiable or excusable under the statute.

There was some slight evidence of a "fight" between the accused and the deceased. The accused came to the house where the deceased lived with his parents, and the wife of the accused was there having blood upon her from a recent wound. Brown, the accused, came in and siezed a fire-dog and pursued his wife with it. The mother of deceased took away the fire-dog from Brown on the piaza. Willis Taylor, the deceased, told Brown not to strike his mother, and Brown was ordered out of the house, and Willis went out also; and on the piaza of the house the affair culminated. It was "about an hour after night." Witnesses state that Willis was unarmed, and "Brown cut him three times." Nobody saw the cutting, but Mrs. Taylor "heard the knife cut through the pants of Willis," she being on the piaza at the time. Brown "cut the guts out" of Willis, who died next day on the way going to town to have his wound dressed. The wounds were in the abdomen and on his back. Mrs. Taylor says Brown and Willis were disputing and went out on the piaza. Eli Taylor says he "did not see the fighting;" that he "had no idea they would fight; as I heard them fighting I ran out there, and when I got there Willis told me to do something for him 'as my guts are cut out.'" Doctors testified that the death was from the wounds. Mrs. Taylor says that after the cutting she picked up a stick and threw it at Brown, and he ran away.

This is all the testimony as to fighting. There is no testimony of any loud noise or struggling between the disputants, so far as the record shows, save the statement of Eli Taylor, "as I heard the fighting I ran out," &c. This does not show that Willis Taylor was making an assault of any kind, or was in any way aggressive.

Whatever want of precision, therefore, on the part of the Judge in his charge, which might have been a material

error if the testimony had shown that there was a mutual combat, and it had appeared that there was cause or excuse for the use of a dangerous weapon by Brown, it could have availed him nothing before any intelligent jury upon this evidence if the charge had been more full and precise in the respects complained of, and the verdict must have been at least that of manslaughter in the third degree, as found by this jury.

We do not find in the record that any error appears to have been committed affecting the rights of this defendant.

In such case, considering that *any* proper charge by the court to the jury must have produced a verdict of guilty of an offence of the grade found, and although it may appear that abstract errors may have occurred, not prejudicial to the defendant and from which he has suffered no damage, the verdict should not be disturbed. (5 Fla., 268; ib., 465; 6 ib., 482; 8 ib., 391; 17 ib., 730.)

The judgment is affirmed.

MORRIS METZGER, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. The purpose of Section 12, of sub-Chapter 13, of the Criminal Code of 1868, which provides that "no person whose opinions are such as to preclude him from finding any defendant guilty of an offence punishable with death shall be compelled or allowed to serve as a juror on the trial of such an offense," is to exclude from the jury in capital cases any person who, from scruples of conscience or some reason other than the want of sufficient proof, would refuse to find a verdict of guilty.
2. Four petit jurors had been accepted and sworn when the State Attorney learned that one of them, who had been examined on his ***voir dire***, had, in a conversation shortly before the finding of the indictment, remarked that he was opposed to capital punishment,

and argued that it would be better to imprison the accused for life than to hang him, and had, in another conversation as to the case, stated in substance that he was "opposed to capital punishment under certain circumstances, and if he was a juror would not go for capital punishment." Upon motion of the State Attorney, made before proceeding further, and supported by an affidavit as to each conversation, the Circuit Judge set aside the juror as incompetent: *Held*, 1st, that setting him aside was not error; 2d, that setting a juror aside under such circumstances is not the mere arbitrary exercise of power by the Judge, but is the exercise of judicial discretion, and his action should not be reversed unless their appears to be a departure from the exercise of a sound discretion.

3. Whether the circumstances attending a confession, or a conversation in which the accused has made statements showing his knowledge of the time and manner of the killing, the *weapon used*, and the motive influencing him and evidencing his guilt, are such as entitle the same to be received in evidence as the deliberate and voluntary statement of the accused, is a question for the court to decide. The usual practice is to ascertain these circumstances before the admissions or statements are permitted to go to the jury; but if such inquiry is not made in advance it may be made afterwards, and if it appear that the confession or statement was not voluntary, or was induced by improper influences, the testimony should be excluded from the consideration of the jury. Where the circumstances are developed by the witness in his detail of the confession or conversation, or from such inquiry, and the confession or statements appear to have been made voluntarily, and not to have been induced by improper influences, they should not be withdrawn or withheld from the jury.

4. Under the act of 1877 (Chapter 2096), requiring a Circuit Judge to charge the jury only upon the law of the case, it is improper for him to charge that there is no conflicting evidence in the case; but, as in the case at bar, there was, in fact, no conflicting evidence, and the charge did not operate to the prejudice of the accused: *Held*, Not to be a material error affecting the judgment. Chapter 2096 and Chapter 138 distinguished.

5. The statement in the charge that "in addition to the circumstantial evidence offered in this case, is also what *is said to be* the confession of the accused in relation to his connection with the murder of Samuel Moore," is not a charge that certain facts are proved, nor a violation of Chapter 2096.

6. Such statement coupled with the remark that "admissions or confessions are strong evidence against a party," qualified by the observations that " in circumstantial evidence there must be a clear connection with the event or fact charged, and the circumstances connecting the person with the event, and that confession must have been made without any effort to obtain such from either fear or promise of reward in any manner; in other words, it must be freely made without inducement or threat," are correct propositions, and are not instructions as to what facts are proved, nor as to the conclusions to be drawn therefrom, beyond the application of rules of law to the evidence.
7. It is not error to refuse to give instructions asked by a party when the same have been already given in substance by the Judge in his charge to the jury.
8. Where instructions containing several propositions are requested it is not error to refuse to give the whole if they contain a single erroneous proposition.
9. The refusal of the Judge in charging the jury to instruct them that a majority of them may recommend the prisoner to the mercy of the court under the act of 1872 (Chapter 1877), which recommendation reduces the penalty to imprisonment for life in the State Prison, is not error. Either the counsel or Judge may read the act to the jury if it is desired, but the Judge is not required by law to give such instruction as a part of the charge.

Writ of Error to the Circuit Court for Brevard county.

Metzger was indicted for murder in the first degree. After the arraignment and plea of not guilty four petit jurors were selected, accepted and sworn, among others one Hoke. The State Attorney, afterward and before other jurors were called, informed the court that since the examination of Hoke on his *voire dire* he had been informed that Hoke had previously expressed an opinion concerning the case, and had declared that he was opposed to capital punishment, and would not, if he was a juror, go for capital punishment. Affidavits in support of the suggestion were read, upon which the State Attorney moved that Hoke be set aside as incompetent. The affidavit of Parker stated that a few days before the finding of the indictment, in a

conversation with Hoke, the latter had said that he "was opposed to capital punishment, and argued with deponent that he thought it would be better to imprison Metzger for life rather than to hang him." The affiidavit of Albee stated that in a conversation with Hoke about three weeks before concerning the murder deponent expressed himself strongly concerning the crime, and declared that if Metzger committed the crime he ought to stretch, meaning hang; whereupon Hoke replied that he was opposed to capital punishment under certain circumstances, and that if he was a juror he would not go in for capital punishment, or words to that effect. Whereupon the Judge set aside the said Hoke from the jury, and the defendant, by his attorney, excepted thereto.

II. On the trial Miles O. Burnham, a witness for the State, was asked, "Please state what the conversation was that took place between you and Morris Metzger (accused), giving what each of you said as nearly as you can recollect it?"

This question was objected to on the ground that it is not shown by the witness that such statements were made voluntarily, without any force or any promises or any other influences addressed to the mind of the accused, or that such statements were made before or after the accused was charged with the crime or arrested, which must be shown before the statements or confession of the accused are submitted to the jury for their consideration as evidence. The objection was overruled, the court stating that the objection in not made at the proper time. To this ruling an exception was taken. The witness had just stated that he was acquainted with the accused, and had seen him on the night after the murder of Samuel Moore; had a conversation with Morris Metzger; did not make any threats to him on that occasion. Then the above question was asked and objected to as stated.

Witness Burnham then detailed a conversation with the accused in relation to the killing of Moore, which testimony was strongly against him, showing his knowledge of the time and manner of the killing, and the motive and the weapon used. One reason he gave was that "Moore had not given him as much whiskey as he wanted;" another was that "Moore knew too much about him;" another was that "it was done for money." Other pointed testimony was given by Burnham, and there was no cross-examination. The further testimony showed that the declarations of the accused were made voluntarily and without any inducement or compulsion whatever. The defendant introduced no testimony or statement on oath.

III. The court charged the jury, among other things, as follows: "In this case there is no conflicting evidence, and in addition to the circumstantial evidence offered in this case is also what is said to be the confession of the accused in relation to his connection with the murder of Samuel Moore. Admissions or confessions are strong evidence against a party, and more so when unexplained or not denied."

To this portion of the charge defendant's counsel excepted.

IV. The defendant's counsel presented to the Judge certain instructions, covering ten pages of manuscript, which they prayed might be given in charge to the jury. Some of it was pertinent to the evidence and the law, and all of it that was material and pertinent to the case was contained in the charge of the court, which was very full. It is unnecessary to spread them upon the record here.

The court declined to give the instructions as presented, and the defendant excepted.

A motion for a new trial was denied, and sentence of death pronounced by the Judge.

To review this judgment a writ of error was issued.

The errors assigned are—1st, that the court discharged the juror Hoke after being chosen and empanelled upon the ground stated; 2d, in admitting the testimony of M. O. Burnham to the declarations or admissions of defendant; 3d, in charging the jury as above stated; 4th, in refusing to give the instructions prayed for by defendant's counsel and 5th, in refusing a new trial.

John W. Price for Defendant in Error.

The Attorney-General for The State.

THE CHIEF-JUSTICE delivered the opinion of the court.

1. In respect to the first error assigned, the discharging of the juror Hoke on the ground that he had declared in reference to this defendant and the case that as a juror he would not go for capital punishment, but thought it would be better to imprison Metzger for life, it is difficult to discover any violation of duty on the part of the court. The statute says, "no person whose opinions are such as to preclude him from finding any defendant guilty of an offence punishable with death shall be compelled or *allowed* to serve as a juror on the trial of such an offence." Laws 1868, p. 108, §12.

Here is an express statute disqualifying those whose opinions are such as would prevent them from convicting persons of capital offences from setting on juries in such cases. Here two persons make oath in his presence that Hoke has said that if he were on the jury he *would not* go for capital punishment, in other words, he would not be an instrument of inflicting the penalty of death, and he makes no denial of the charge that these were his opinions.

One of the best methods of ascertaining the opinions of men is "by the expression of them." If there is any bet-

ter mode it has not been suggested. The expression of his opinion here in effect is, that he would not find the accused guilty, even if guilt be proved, unless assured that the penalty would not be death. The object of the statute is to prevent persons going upon a jury who would refuse from scruples of conscience to find a verdict of guilty, or for some reason other than that of a want of a sufficient proof, and to procure juries who would be governed by their oaths to find according to evidence. See 2 Mason. 105.

There are cases where it has been held that the expresssion of the juror, that he "would not like" to have a man hung, was not sufficient to show him incompetent, or that he would not find a verdict upon the evidence. (Smith vs. The State, 55 Miss., 410.) But it has heen held in most of the States that one who has conscientious scruples against capital punishment was incompetent as a juror in a capital case, upon the principle, that the law will not compel a man to violate his conscientious convictions.

In this case the juror had been called, accepted and sworn, but the jury was not full when the objection was made, and there is nothing showing that the jury empanelled was not a fair jury, or that there was not a fair trial.

The setting aside of the jury in this case was not the mere arbitrary exercise of power by the judge. Being present and obliged to exercise his judgment on the moment much should be allowed to his discreet judgment called discretion, and "unless there is a departure from the exercise of a sound discretion by the court in the matter of excusing jurors this court cannot consider it error." 16 Fla., 562; 2 Mason, 91; 9 Ala., 302. It is unnecessary to multiply authorities upon the general subject.

2. The admission of the testimony of Burnham to the conversation with the accused, called, "admissions" or confessions," is assigned for error. There was no confes-

sion by him that he was guilty of the crime. His statements are with reference to certain facts which may have been, and perhaps were, quite as convincing of guilt as direct confessions of guilt.

The testimony of Burnham was a detail of his conversations with the accused, and the manner of the detail of such conversation and the circumstances under which they were had, showed sufficiently whether they were voluntary or induced by any improper influence. It clearly appeared from the testimony of Burnham that no undue influence had induced the accused to converse or answer questions. It is for the court to determine whether the circumstances attending such admissions or confessions are such as that they that should be received as the deliberate and voluntary statements of an accused person. The usual practice is to make the inquiry before the admissions or statements are shown, but if this inquiry is not made in advance it may be made at any time, and if it shall appear that the statements were not voluntary, or were induced by improper influences, the testimony should be excluded from the consideration of the jury. The true rule is that the circumstances under which the declarations or admissions were made should be shown, and if they appear to have been voluntary to submit the evidence to the jury, and if otherwise to exclude it. The question was sufficiently settled in Simon vs. The State, 5 Fla., 285, 295; Dixon vs. The State, 13 Fla., 636, 643-4, and citations; King's case, 40 Ala., 314; Bob's case, 32 Ala., 560.

The testimony was properly submitted to the jury, it appearing that the declarations were made without any improper influences having been exerted to induce it.

3. The fifth error assigned relates to that portion of the charge excepted to. It is insisted that in this the court charged not alone "upon the law of the case, that is upon

some point or points of law or exceptions to evidence arising upon the trial of said cause," (Laws 1877, Ch. 2096,) but upon the character and bearing of the evidence, and indicated that the evidence tended to prove the guilt of the accused.

The Judge commenced the paragraph excepted to with these words: "In this case there is no conflicting evidence." It is difficult to say that this is not a plain declaration and that the testimony is harmonious in that there is no conflict in the facts shown, or contradiction by witnesses of the testimony of each other, or of any other fact appearing in evidence. If there were contradictory statements of witnesses it would be error to charge the jury that there were none, because it is with the jury to determine whether there were conflicting statements, and to try to reconcile them, and to determine the truth. The statement to the jury that the testimony of witnesses does not conflict is therefore assuming the province of the jury, and this is precisely what the law forbids. The question this is, whether this is an error which operates to the prejudice of the defendant ? for if not it is not an error that should effect the judgment.

The act of 1848, Ch. 138, Sec. 8, provided that charges made by Judges to juries in all criminal cases "shall be exclusively on points of law, and that any violation of this section shall be deemed and construed to be error, from which a writ of error may be prayed as of right." Under this section it is clear that the foregoing portion of the charge would be deemed error and result in reversing the judgment.

The act of 1877, however, repeals the eighth section of the act of 1848, and in re-enacting the requirement that the charge shall be confined to points of law has omitted the words "any violation of this section shall be construed

) be error," &c. so that the error of the Judge wil not affect the judgment, unless as in other cases the error is material, affecting injuriously the rights of the accused. This was held in Brown vs. The State, 18 Fla., (decided at the present terms) and cases there cited.

Looking through the testimony given fully and at length in the record, we do not find that there was the least contradictory or conflicting testimony whatever. The defendant adduced no testimony and made no statement on his oath of the facts of the case.

There was, therefore, nothing in this part of the charge which could operate to his prejudice or affect the verdict. Nothing further was said by the Judge to the jury which can be held to be contrary to the spirit or letter of the statute in relation to the testimony.

He says: "In addition to the circumstantial evidence offered in this case is also what is said to be the confession of the accused in relation to his connection with the murder of Samuel Moore. Admissions or confessions are strong evidence against a party, and more so when explained or not denied."

This it is insisted by the plaintiff in error is erroneous, in that it charges that certain facts are proved, &c. We do not so understand it. The Judge speaks of circumstantial evidence in the case. This is true, there was circumstantial evidence, and the counsel desired a charge upon it as such. The Judge then says, "there is *what is said to be* the confession of the accused," &c. The Judge does not say it is a "confession," but speaks of it as what is so called: a very appropriate method of calling attention to the testimony which relates to the conversations with the accused in relation to the crime alleged against him.

We can discover no violation of the rule in the langua[ge] certainly nothing which could in any way in[jure]

Then it is complained that the Judge added, in connection with the circumstantial character of the evidence and the declarations of the accused, "admissions or confessions are strong evidence against a party when unexplained or not denied." It is due to the Judge that the further language used by him in his connection to be as elucidating his position, viz: "Observing that in circumstantial evidence there must be clear connection with the event or fact charged, and the circumstances connecting the person with the event, and that confessions must have been made without any effort to obtain such, either from fear or promises of reward in any manner, in other words, it must be freely made without inducement or threat."

These are correct propositions, and clearly indicate that the court did not intend the jury to understand him as instructing them upon the construction of facts proved or conclusions of fact to be drawn from such proof, beyond the application of rules of law to the facts.

While it is true that admissions and confessions of accused persons should be received and weighed with great caution as to the motives which induced them and the condition of the accused, yet when such admissions are shown to be entirely voluntary they are, in connection with circumstances corroborating them, "strong evidence." The principle upon which the confessions of prisoners are received in evidence is based upon the presumption that a person will not make an untrue statement against his own interest. 1 Phil. Ev., 9th Ed., 397; Roscoe Cr., 7 Am. Ed. 38, *et seq.*

We, therefore, find no error in tbe charge to which exception was taken.

4. The sixth error is assigned upon the refusal of the Judge to give the instructions prayed by defendant. In examining these voluminous instructions we find that the

Judge gave in his general charge everything contained in them which is material to the case,and to have given them again would be but an unnecessary repetition, and there was no error in refusing such repetition. There was embodied in these instructions some propositions that were manifestly erroneous. For instance: "The confession of a person made before he is arrested, or any charge made against him which has come to his knowledge, * * * is under the most favorable circumstances very weak and *worthless* evidence." The "confession" in the present case was not shown to have been made under the circumstances mentioned, and if it had been it was very strong and convincing in connection with other circumstances proved. The exception was to the refusal of the Judge to give the whole of these instructions, and if there was an unsound proposition in them it was not error to refuse so to give them.

5. The last proposition of these instructions was that the court should instruct the jury that "a majority of the jury may recommend the prisoner to the mercy of the court, which reduces the extreme penalty, in case of a verdict of guilty of murder in the first degree, to imprisonment for life."

While it would be well for the Judge in all cases to inform the jury to this effect by reading to them if requested the act of 1872, Ch. 1877, it might prejudice the accused in some instances to give such instruction *in his charge,* because the jury might well infer that in the opinion of the court the crime had been committed, and that he deemed it necessary to instruct them as to the penalty which might be regulated by the jury in the form or contents of their verdict of guilty of murder in the first degree.

But the Judge is not required by law to give any instruction to the jury on the subject, and therefore no error

would have occurred by his refusal. Counsel may read the act to the court and jury if they desire to do so, and the Judge may give it to the jury if desired.

The foregoing covers all the points made upon the motion for a new trial, except that the verdict was contrary to the evidence. Upon reading the whole testimony we are satisfied that the verdict of the jury is right.

The judgment is affirmed.

BENJAMIN BIRD, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. An indictment for murder, otherwise good in form, charging that the prisoner "feloniously, wilfully and of his malice aforethought, with a premeditated design to effect the death of," &c., is a good indictment under our statute.

2. An indictment for murder which charges the crime according to the common law form is sufficient to sustain a verdict for murder without the use of the words, "from a premeditated design."

3. Where it is shown to the satisfaction of the court that there was no misconduct upon the part of the jurors, and it is so certified by the court in the bill of exceptions, the mere separation of the jury is not a sufficient ground for a new trial, especially is this so when the evidence upon that question produced before the court is not brought up in the bill of exceptions.

Writ of Error to the Circuit Court for Duval county.

The facts in the case are stated in the opinion.

T. A. McDonell for Plaintiff in Error.

The Attorney-General for The State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

At the Spring Term, 1880, of the Circuit Court, held in

and for Duval county, Benjamin Bird, with others, was indicted for the murder of one Joseph Nelson. On the trial of the cause in December of the same year a severance was had, and Bird was tried, found guilty and sentenced to death.

After the verdict of the jury the counsel for the defendant moved in arrest of judgment, and also for a new trial, upon the following grounds:

1st. The indictment does not charge the statutory offence of murder in the first degree with that exactness which the rule of law requires, but is defective and uncertain in this, the said indictment avers that the said offence and murder was committed by the said Benjamin Bird *with* a premeditated design to effect the death of the said Joseph Nelson; whereas, the statute declaring what murder in the first degree is, defines it to be *from* a premeditated design; the said indictment wholly failing to use or employ or charge the words of the statute or language of a similar import and significance.

2d. That the jury that tried said prosecution, after all the testimony was in on the part of the prosecution and defence, and before verdict rendered, without permission of the court, but against its direct order, during the night separated, and a part of said jury then and there went into the drinking saloon of one John B. Togni, and then and there drank intoxicating liquors, to what extent this mover knoweth not.

3d. The verdict is contrary to the charge of the court.

4th. That the verdict is not sustained by the evidence.

These motions in arrest of judgment and for a new trial having been heard and considered by the court were overruled and denied. The counsel for the defendant excepted to such ruling of the court, procured his bill of exceptions to be signed and sealed, and brings the case here on writ of

error. The errors assigned in this court are the first, second and fourth grounds urged in the foregoing motions in arrest of judgment and for a new trial. The bill of exceptions does not contain the charge of the court to the jury, no exceptions thereto appearing to have been taken.

The first error assigned, viz: that the indictment is defective for the reason that it avers that the offence was committed *with* a premeditated design rather than *from* a premeditated design, is practically abandoned by the plaintiff in error. The only reference to it in the brief and argument of his counsel is in the following words: "The assignment of errors here discloses the reasons for bringing this cause to the Supreme Court, two of which, the second and third, will be here argued. The first is respectfully submitted without argument." Southern Express Co. vs. VanMeter, 17 Fla., 796.

As this, however, is a case involving the life of a person, we will consider the alleged error as not abandoned.

The indictment charges that the defendants, "not having the fear of God before their eyes, but being moved and seduced by the instigations of the devil, on the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and eighty, with force and arms, at the said county of Duval, State of Florida, in and upon one Joseph Nelson, in the peace of God, then and there being, feloniously, wilfully and of their malice aforethought, with a premeditated design to effect the death of the said Joseph Nelson, in the peace of the State of Florida, then and there being, did make an assault; and that the said Benjamin Bird, a certain pistol, of the value of ten dollars, then and there loaded and charged with gun-powder and one leaden bullet, then and there feloniously, wilfully and of his malice aforethought, with a premeditated design to effect the death of the said Joseph Nelson, did discharge and shoot

off against and upon the said Joseph; and that the said Benjamin Bird, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid, by the same Benjamin Bird discharged and shot off as aforesaid, then and there wilfully, feloniously and of his malice aforethought, with a premeditated design to effect the death of the said Joseph Nelson," &c.

The statutes of our State, Chap. 1637, sub-Chap. 111, Secs. 1 and 2, provide that the killing of a human being, without the authority of law, by poison, shooting, stabbing or any other means, or in any other manner, when perpetrated from a premeditated design to effect the death of the person killed, or of any human being, shall be murder in the first degree.

Murder is described by Sir Edward Coke as "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the King's peace, with malice aforethought, either express or implied." "Malice aforethought," as defined by Mr. Bishop in his work on Criminal Law, is a technical phrase employed in indictments, and with the word "murder" distinguishes the felonious killing called murder from what is called manslaughter. At common law the indictment in this case was good, the offence having been alleged to have been committed "feloniously, wilfully and of his malice aforethought." The statute does not change the common law in this respect; it simply fixes the grade of the offence and permits, in certain cases, the jury to find the defendant guilty of a less offence than that of murder. Uuder our statute an indictment for murder which charges the crime according to the common law form would be good for the reason that the allegations in such indictment would cover all the grades of that crime enumerated in the statute. The State vs. Thompson, 12 Nevada, 140; The State vs.

Crozier, 12 Nevada, 300; The People vs. White, 22 Wend., 175; McAdams vs. The State, 25 Ark., 405., The People vs. Cronin, 34 Cal., 191; Green vs. The Commonwealth, 12 Allen, 170. In the case of White vs. The Commonwealth, 6 Binney's R., 182, the court say: "In the case of the Commonwealth vs. Joyce and Mathias, who were convicted of the murder of Sarah Cross, it was moved in arrest of judgment because the indictment did not charge the murder to have been committed by a *wilful, deliberate and premeditated killing, as expressed in the act of Assembly.* But the motion was overruled and the murderers executed."

The second error assigned is, that the jury, after the testimony was in, in the night, and in opposition to the order of the court, separated and some of them went into a drinking saloon and took intoxicating liquors. The bill of exceptions recites the facts in regard to such separation as follows: "It appearing to the court by evidence taken that on the night before the conclusion of the said cause two of said jurors crossed the street to said saloon, and that one of them drank one glass of ale, and that both of said jurors immediately returned to the jury room, and that no one approached them to influence them against defendant; that the said court did consider and decide that the said motion should not be granted." Here is the judgment of the court determining the question raised by this assignment of error. There seems to have been evidence introduced upon the question of the separation, an examination had by the court, and a deliberate decision made. None of that evidence is embodied in the bill of exceptions, and the record is entirely silent upon the question, except as it is referred to in the foregoing extract. To have enabled this court to determine whether the ruling of the court below in this respect was correct, and in the exercise of a sound

discretion, the evidence should have been been included in the bill of exceptions.

In the case of The State of Florida vs. Madoil, 12 Fla., 151, this court says: "In this case the record shows that the Judge, who presided on the trial, when it was made known to him that the jury had separated, instituted a strict inquiry into their conduct, and was satisfied from the proofs that there had been no misbehavior on the part of the jury, as indeed none had been charged." This is the precise case before us. The Judge has certified by overruling the motion that there had been no misbehavior on the part of the jury.

In the case of The People vs. Ransom, 7 Wendell, 417, after citing several cases bearing upon this subject of separation and misconduct of the jury, the court says: "The conclusion from these cases appears to me to be this: That any mere informality or mistake of an officer in drawing a jury, or any irregularity or misconduct in the jurors themselves, will not be a sufficient ground for setting aside a verdict, either in a criminal or civil case, when the court are satisfied that the party complaining has not, or could not have sustained any injury from it." This seems to be the rule in most of the States of this Union, except perhaps that in some States it is held that the burden of satisfying the court that the prisoner has sustained no injury from the separation is on the State and not the prisoner. This last question, however, is not in this case, and we do not attempt here to decide it. O'Conner vs. The State, 9 Fla., 241-5; Coleman vs. The State, 17 Fla., 206; The State vs. Harris, 12 Nevada, 414; Pratt vs. The State, 56 Ind., 179; Roberts, *et al.*, vs. The State, 14 Ga., 8; The State vs. O'Brien, 7 R. I., 336; The State vs. Conway, 23 Minn., 291; The State vs. Prescott, 7 N. H., 287; The State vs. Igo, 21 Miss., 459; Stanton vs. The State, 13 Ark., 317; Bishop Crim. Procedure, §999, and laws cited.

As to the fourth error assigned, that the verdict is not sustained by the evidence, the substance of the evidence is only given in the bill of exceptions, and is in the following language: "Thereupon the said State to maintain the issue produced a number of competent witnesses, and did then and there prove and establish the following facts: That the hands on Clark's mill, in the city of Jacksonville, in the said city, county and State, including the defendants, Benjamin Bird, ceased and discontinued to work on said mill, and threatened and did attempt to prevent other employees from working at said mills; that a week before, and on the day of said homicide, they had assembled in great numbers with arms of various kinds, including fire-arms, in the vicinity of said mill, and in the said city, with the avowed purpose of making the mill hands then at work on said mill discontinue working; that on the 25th day of June, A. D. 1880, the said defendant with many others were engaged in riot and tumult then and there; that the police officers of said city, of whom the deceased, Joseph Nelson, was one, tried in every legal manner to suppress said riot and tumult; that the people of said city were in great apprehension of disastrous consequences from said rioters; that the defendant, Benjamin Bird, who was one of said rioters, and seemed to be the leader, was on the opposite side of the street from Nelson, the deceased, about fifty or sixty feet; that the said Nelson, who was being pressed by the said rioters in his efforts to perform his duty, fired a pistol shot in the air. A moment after the said shot was fired the defendant had crossed the street, and inquired who fired that shot. One Joe Williams standing near Nelson, and who was one of the active participants in said riot, replied, pointing to Nelson: 'That white-faced son of a bitch, Joe Nelson;' that defendant instantly aimed, and covered Joe Nelson with a

pistol and fired, wounding him, the said Nelson in the right side; that Nelson immediately dropped his pistol, and staggered and put his hand to the wound and said: 'I am shot,' and was then taken off; from which wound Nelson in a few days died; that Bird, after shooting Nelson, then and there escaped, and was captured a day or two after, and the riot was then and there, after shooting of Nelson, suppressed." Such is the statement of all the facts and the evidence as given to us in the bill of exceptions. The jury by their verdict have found from the evidence before them that Bird "feloniously, wilfully and of his malice aforethought" committed murder. We are not disposed, after a careful examination of the slight testimony above recited, to doubt the propriety of such verdict, and must affirm the judgment of the court below.

DECISIONS

OF THE

SUPREME COURT OF FLORIDA.

JANUARY TERM, A. D. 1882.

WM. LAKE ET ALS., APPELLANTS, VS. THE STATE OF FLORIDA EX REL. J. D. PALMER ET ALS., APPELLEES.

1. Where the pleadings in a proceeding by information in the nature of a *quo warranto* show a good cause of action in favor of the State, it is immaterial whether the person upon whose relation the information is filed establishes his title to the office. There is nothing in Chapter 1874, Laws, which changes this rule.
2. A law which does not in terms assume to revise, alter or amend any prior act or section of an act, but by various transfers of existing duties, the imposition of new duties, and the creation of new officers to perform such duties, has the effect to restrict the operation of antecedent legislation, and thus by implication to modify it, is not unconstitutional.
3. A statute which creates a new class of municipal corporations, leaving nothing to [illegible]n or discretion as to its operation in creating the new class, and which imposes like duties and bestows like powers upon each municipality of the new class, is a law of uniform operation within the meaning of that term as used in the Constitution of this State. Chapters 1874, 3162 and 3312, Laws of Florida, construed, so far as they affect proceedings upon information in the nature of a *quo warranto*, and the creation of a Board of Health for a new class of municipal organizations.

Appeal from the Circuit Court for Nassau county.

Chapter 1874, Laws of Florida, approved February 2, 1872, is as follows:

SECTION 1. That in all proceedings upon writs of *quo*

warranto, information in the nature of such writs or civil actions instituted to obtain the remedies obtainable by such proceedings, where the Attorney-General institutes the action and does not make all the persons claiming the title to the office parties,then,and in that case,it shall be within the power of the court to make parties defendant of all persons so claiming the office and not made parties by the Attorney-General: *Provided*, That the said persons so desiring to be made parties shall be required to set forth, by petition under oath, a *prima facie* case of right and title to the office before the court can be required to make the order, and give security to the satisfaction of the court for the payment of all costs which may be awarded against him.

SEC. 2. That any person claiming title to an office which is exercised by another shall have the right, upon refusal by the Attorney-General, to institute proceedings in the name of the State upon such claimant's relation, or upon the Attorney-General's refusal to file a complaint setting forth his name as the person rightfully entitled to the office, to file on information, or institute an action in the name of the State against the person exercising the office, setting up his own claim. In this case the court is authorized and required, in any and all events, to determine the right of the claimant to the office if he so desires: *Provided, however*, That in this, as well as in all other proceedings of this character, no person shall be adjudged entitled to hold an office except upon full proof of his title to the office.

SEC. 3. In all cases where an individual institutes an action without the consent of the Attorney-General, the judgment shall be conclusive as between the parties other than the State; such judgment shall not be a bar to any *quo warranto* proceeding by the State, nor shall a judgment in such proceeding instituted by the Attorney-General be a

bar to proceedings by any claimant other than the parties thereto. The party recovering the judgment shall, however, be entitled to exercise the office until removed by *quo warranto* proceedings, or until his right thereto shall otherwise cease.

SEC. 4. Where the Attorney-General institutes an action setting forth the name of the person rightfully entitled, or files on information upon the relation of a party claiming title, the Attorney-General shall not have the right to dismiss such proceedings without the consent of the claimant, but the court shall investigate the claim and determine the right, if so desired by the person upon whose relation the information is filed; and such claimant may have counsel of his own choice to control the proceedings in his behalf.

A. A. Knight, for Appellants, cited: High on Extra. Rems., §630; State vs. Boal, 46 Mo., 528, as to second defence; and Greencastle vs. State, 28 Ind., 382; Martinsville vs. Frieze, 23 Ind., 507; Cooley's Con. Lim., 151-2; People vs. Mahoney, 31 Mich., 497; Walker vs. Caldwell, 4 La. Ann., 297; 5 La. Ann., 94; Meek vs. Detroit, &c., 30 Mich., 511, as to the sixth defence.

Fleming & Daniel and *The Attorney-General,* for the Appellees, cited as to the second defence: High Ex. Rems., Secs. 712, 713, 716; 4 Cowen, 118; State vs. Gleason, 12 Fla.,265; and as to the sixth defence,McAunich vs. Miss., &c., R. R., 20 Iowa, 338; 17 Cal., 547; McConihe vs. McMurray, 17 Fla., 238; ex-parte Pollard and ex-parte Woods, 40 Ala., 77; People vs. Mahaney, 13 Mich., 481; Spencer vs. State, 6 Ind., 41; Branham vs. State, 10 Ind., 497; Gibson vs. State, 16 Fla., 291.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an information in the nature of a *quo warranto,*

prosecuted by the Attorney-General of the State, in the name and by the authority of the State, upon the relation of the appellees.

The information is brought to try the right and title of the appellants to have and exericise the franchises and powers appertaining to the Board of Health of the City of Fernandina. Through the information it is alleged that the City of Fernandina is and was, on the 7th of March, A. D. 1881, an incorporated city, and contained at that time, and from that date to the date of the information, more than 300 registered voters; that the relators were, on the 15th March, A. D. 1881, appointed by the Governor of the State of Florida a Board of Health for said city by virtue of the provisions of Chapter 3312, of the Laws of Florida; that James McGiffin is Chairman of the Board of County Commissioners of Nassau county and *ex-officio* a member of said Board of Health; that said relators with said Mayor are the duly authorized Board of Health of said city, and are entitle to exercise the privileges and powers of such Board.

The information then informs the court by the Attorney-General, in the name and authority of the State of Florida, that the respondents, naming them, have, for the space of four months last past and upwards, claimed to be members of such Board of Health, and have, with Clinton Haley as Mayor of said city exercised the powers appertaining thereto without warrant or authority of law, and that upon the people of the State of Florida they have, and still do, unsurp such rights,powers and franchises to the damage, &c.

The prayer of the information is for process against the respondents and appellants to answer to the State of Florida by what warrant and authority they exercise the powers and franchises aforesaid.

The answer of the respondents to the information consists of eight grounds, but only two of them are insisted upon in this court. They are the second and sixth grounds, and are as follows:

Second. That it is not true, as alleged in the affidavit of affiant Starbuck, that relators were on the 15th of March, A. D. 1881, appointed by the Governor of the State of Florida a Board of Health for the city of Fernandia, as set out more fully in affiant Starbuck's affidavit, but on the contrary if said relators have any appointment at all as a Board of Health this appointment and commission constitutes them a Board of Health for Nassau county, Florida, and not for the said city of Fernandia.

Sixth. That they are informed and believe that the act of March 7, 1881, Chap. 3312, Laws of Florida, under which relators' claim, is unconstitutional, in that said act is special and local, and also because it is not general in its character and effect. The answer further sets up the fact of the election of Haley as Mayor and the other respondents as Aldermen of said city at an election on the 4th day of April, A. D. 1881, and that they have taken the oath of office and entered upon the discharge of their duties.

To this answer the Attorney-General demurred. The grounds of the demurrer, so far as the counts relied upon in this court are concerned, were that the respondents must either disclaim or show full title, that it was no defence to show a want of title in the relators, and that the act of March 7, 1881, is constitutional and abrogates Section 1, Chapter 3162, so far as the same applies to cities containing 300 or more registered voters. And after hearing upon the demurrer it was sustained, and there was judgment of ouster, by which it was considered and adjudged that the respondents, (not including the Mayor) or any of them, do not intermeddle with or exercise the office of member of

the Board of Health of the city of Fernandina, and they and each of them were prejudged and excluded from holding said office or offices.

From this judgment of ouster this appeal is prosecuted.

From the statement of the case it is evident that there are but two questions raised in this appeal. The first is, whether the relators not being a Board of Health for the city of Fernandia is a good answer to the information. It it true that the information sets up title in the relators, but it is also true that the State, through the Attorney-General, charges usurption upon the respondents, and the judgment of ouster does not in any manner adjudicate the right of any other party to the office of offices, nor does the prayer of the information extend beyond a simple judgment of ouster against the respondents.

The rule upon this subject anterior to the act of February 2, 1872, Chapter 1874, Laws of Florida, was that if the pleadings show a good case of action in favor of the State, a demurrer would not be sustained upon the ground that it appeared that the relator was not entitled to the office. The question in such proceeding was not simply whether the claimant upon whose relation the information was filed was entitled to the office, but also whether the respondent was entitled to it as against the State. In this information the State, through the Attorney-General, charges usurption and requires the respondents to show by what warrant they exercise the office and franchises named, and it is no defence for them to say that some other person is not entitled, because a want of title in another, even though this other be the party who claims the office and upon whose relation the information is made gives them no right. Because A. is not entitled to an office does not prove that B. is. The State's right is to oust B. if he does not show title. State vs. Palmer, 24 Wis., 63; State *ex rel.* Attorney-General, 12

Fla., 265. The primary right to the office is in the State, and unless the party exercising its franchises shows a right to it he is a usurper and must be ousted.

The act of February 2, A. D. 1872, does not change this rule. The first section of that act gives the court the power, where the Attorney-General fails to make all claimants parties, to make them parties upon their own petition. Its purpose was to prevent any discretion of the Attorney-General intervening so as to prevent a determination of the right of any claimant of an office to it when the right to that office became the subject of inquiry by the State through him.

The second section of that act gives a party claiming an office the right to institute proceedings in the name of the State upon his own relation, if the Attorney-General refused so to do.

The third section of the act does nothing more than define the effect of a judgment where the individual institutes the proceeding without the assent of the Attorney-General, and the fourth section denies the Attorney-General the right to dismiss proceedings without the consent of the claimant, when the information has been filed by him upon such claimant's relation.

It is clear that there is nothing here by which the respondents can claim that a judgment of ouster against them cannot be awarded, because the claimant upon whose relation the information is filed does not establish his right.

This disposes of the matter set up in the second ground of respondent's answer.

The next and last question involved in this case is the constitutionality of the act of March 7, 1881, Chapter 3312, Laws of Florida, entitled "An act to provide for the appointment of Boards of Health for incorporated Cities and Towns in this State containing three hundred or more reg-

istered voters," in so far as the act proposes to divest the Aldermen and City Physician of the City of Fernandia of their offices as members of said Board, and to vest the offices in the appointees of the Governor.

The Aldermen and City Physician held their offices under the act of March 11, 1879, Chapter 3162, Laws, entitled "An act to provide a uniform system of Quarantine in this State." The first section provided that the Mayor, Aldermen and City Physician, if there be one, of every incorpated city or town in this State shall be and are hereby constituted a Board of Health for said incorporated city or town, and when there is no incorporated town or city the Board of County Commissioners shall constitute a Board of Health for such county.

The remaining sections of the act simply bestow powers in reference to quarantine regulations upon this Board of Health.

The first section of the act of March 7, 1881, Chapter 3312, Laws, provides that the Governor of the State of Florida shall appoint, for every incorporated city and town in this State containing three hundred or more registered voters, a Board of Health, consisting of five discreet persons, not less than two of whom shall be medical men of acknowledged skill and experience, to serve without pay. All vacancies occurring shall be filled by appointment made by the Governor.

The second section of the act provides that the Mayor of the city and Chairman of the Board of County Commissioners shall be *ex-officio* members of the Board.

Section three fixes the term of office of these appointees. Section four gives full power as to public health, abatement of nuisances and vital statistics. The fifth section provides that this Board, as to the matters of quarantine, shall have all the powers conferred upon Boards of Health

in the act of March 11th, 1879, and the sixth and last section enacts as follows: "This act shall in no wise be construed as repealing section one of an act entitled an act to provide a uniform system of Quarantine in this State, approved March 11, 1879, so far as it relates to cities and town of less than three hundred registered voters."

The first objection, based upon constitutional limitations upon the power of the Legislature, to this legislation is that this act is not uniform in its operation. Accepting the view that this constitutional limitation is appliable to this legislative action, we think it clear that its operation is uniform within the meaning of the limitation fixed by the Constitution.

This enactment applies to *all* cities and towns containing three hundred or more registered voters. The exercise of legislative power is positive and fixed in its results. There is neither local option nor discretion in the matter of its application. It creates a class of municipal corporations with power regulated by the number of its registered voters, that being the standard rule by which the class is fixed and ascertained. If the city or town belongs to the class created by the law, the act operates *proprio vigore* without reference to the assent or dissent of the municipalities or the electors within them. As to the class created the powers are uniform and identical. We simply follow and affirm the views expressed by this court in the case of McConihe vs. McMurray, 17 Fla., 238, in the conclusion we here reach, which is that this act is not subject to the objection of a want of uniformity in its operation within the meaning of that term as used in the Constitution when limiting legislative power in this respect. McConihe, Mayor, vs. The State of Florida *ex rel.* McMurray, 17 Fla., 238.

Another objection here urged, based upon organic limitations upon legislative power, is that this legislation is

prohibited by Section 14, Article 4, of t
which provides that each law enacted in
shall embrace but one subject and matter pr
therewith, which subject shall be briefly
title, *and no law shall be amended or revise*
its title only; but in such cases the act a
section as amended, shall be re-enacted
length.

The question here is, is this a revision
amendment of a section of an anteceden
meaning of this limitation upon the powe
ture in the matter of revision of anteced
amendment of sections of prior statutes.
law upon which this act (Chapter 3312,
created a Board of Health with powers r
antine regulations. Such was the expre
the Legislature, the title of the act being
vide a uniform system of Quarantine in t
examination of the act will show that
conferred were incident to the creation of
form" quarantine system. The purpose of
the subsequent law here was not to reverse t
in which that term is used in the Consti
tainly true here that no single section o
act can be considered as in lieu of any si
preceding, nor can the entire subsequent
in lieu of the preceding act. Every secti
ing act is left operative as to municipalit
in the clas created, nor is the subsequent
operation to the matters involved in the
purpose of the prior act was to establish
antine. The second not only regulated th
antine as affecting public health, but gave
as to the public health in that it bestowe

the powers appertaining to quarantine regulations, a general power in regard to all matters pertaining to the public health and vital statistics, as well as the power to abate nuisances. The purpose of the Legislature was not to amend the first section of the prior act here in the sense that it was intended to so change its phraseology as to strike out any clause of it and cause that portion stricken out to cease to be law, and that portion inserted to become law in lieu thereof. The Legislature declares its intent as to the first section of the subsequent act here to be not a general repeal of the antecedent legislation which existed upon the subject of quarantine or Boards of Health in municipalities having less than three hundred voters. Its purpose was to create a new Board of Health for a new class of municipalities, with enlarged powers and duties, leaving the existing system operative as to the other municipal organizations not embraced in that class. It was independent, not revisory or subordinate or amendatory legislation. It was legislation inconsistent with and in denial of the future right of Boards of Health, as then organized, to exercise any power in the new class created, and its operation, so far as it creates a new Board of Health, (Sections 1 and 4,) is by independent and direct legislation.

The effect of the act of March 7, 1881, is by implication and repeal to prevent the enlarged operation of Section one of the Act of March 11, 1879, by limiting its operations to towns and cities having less than 300 voters. To that extent the Legislature in effect declares its purpose to repeal the antecedent legislation, and we do not think that it is an amendment of a section or the revision of an act within the meaning of the constitutional limitations upon these subjects.

In the language of Judge Cooley, " a law which does not assume in terms to revise, alter or amend any prior act or

section of an act, but by various transfers of duties has an amendatory effect by implication," is consitutional. "It is not the meaning of this provision of the Constitution that upon the passage of each new law all prior laws which it may modify by implication shall be re-enacted and published at length as modified." The other cases cited by appellees here abundantly sustain our conclusions. The objection that the subject of the law is not briefly expressed in the title, we understand, is withdrawn but if it is not, there is plainly nothing in it, as the title here does briefly and plainly express the subject to be legislated upon.

Judgment affirmed.

CANOVA, ET AL., COMMISSIONERS OF BAKER COUNTY, APPELLANTS, VS. STATE EX REL., COMMISSIONERS OF BRADFORD COUNTY, APPELLEES.

1. When the Legislature divided New River (Bradford) county it was competent to provide that the new county created out of its territory (Baker) should assume its *pro rata* share of the indebtedness of the former, to be ascertained by the relative valuation of taxable property in each, at the time of the division.
2. The obligation of Baker county to issue its bonds or to pay its debts in the manner provided in the act creating the county passed in 1861, is not affected or controlled by subsequent constitutional or legislative enactment. The obligation of the contract cannot be thus impaired.
3. Before Bradford county can proceed to compel Baker county to issue bonds for its *pro rata* share of the bonded indebtedness of the former to Columbia county, (from which Bradford was taken) it must appear that Bradford had issued and delivered its bonds to Columbia county.
4. Under the act of 1861 creating Baker county it was made a condition precedent to demanding the issuing of bonds by Baker to Bradford that the *pro rata* of the shares of the capital stock in the

Florida, Atlantic & Gulf Railroad Company held by Bradford county should be "set apart" to Baker county.

5. The depreciation of the railroad stock in the possession of Columbia or Bradford county since 1861, for the purchase of which the orginal bonded indebtedness was created, constitutes no valid reason for the refusal, on the part of Baker county, to pay its proportion of the indebtedness.

6. The fact that Baker county was not a party in mandamus poceedings of Columbia against Bradford county does not affect the liability of Baker county; nor does the judgment in that case preclude Baker county from showing the true amount of her liability to Bradford in any proceeding by Bradford against Baker to compel a contribution of a *pro rata* amount of the indebtedness of Bradford to Columbia.

7. A return to an alternative writ of mandamus should, for the purpose of making an issue, set up a positive denial of facts stated, or should state other facts sufficient to defeat relator's right. A mere answer that a sum stated is not the correct amount is not sufficiently specific.

8. Under the law in force in 1861, the Judge of Probate was *ex-officio* chairman of the Board of County Commissioners. The County Judge who succeeds to the Probate office is not now a member of the Board, but the Board as now constituted is the successor of the former Board, and the same duties devolve upon it, except as its duties have been modified by law.

Appeal from the Circuit Court for Columbia county, the cause having been transferred from Baker county.

The relators, as County Commissioners of Bradford county, applied for a writ of mandamus against respondents, as County Commissioners of Baker County, to com- them to issue certain bonds. The writ having been granted directing the issuing of the bonds and the levying of taxes to meet the principal and interest thereon, the respondents appealed.

In or about the year 1856 the county of Columbia, under the Internal Improvement Act of January 6, 1855, subscribed for one thousand shares of the stock of the Flroida, Atlantic and G. C. Railroad Company, and issued its bonds

to the amount of one hundred thousand dollars in payment for the stock, bearing interest semi-annually at eight per cent. per annum. At that time Suwannee, Bradford and Baker were embraced within the limits of Columbia county. In 1858 the Legislature erected the counties of Suwannee and New River from the territory of Columbia. Section 15 of the act (Chapter 895) provided: "That whenever the said new counties shall have fully organized it shall be the duty of the County Commissioners of Columbia county to set apart and transfer to each of them so many shares of the capital stock of the Atlantic and Gulf Central Railroad Company as shall be necessary to constitute a fair division between the three counties of the ten [one] thousand shares of said stock now held by Columbia county, with relative proportion to be determined by the amount of taxible property within the limits of each of said three counties under the assessment made by the Tax Assessor and Collector next preceding the date of the transfer of said stock." Section 16 reads as follows: "That the County Commissioners of each of the said counties of Suwannee and New River shall, on the making of the transfer of said stock as provided in the preceding section, execute bonds under the seal of their respective counites, payable to the County Commissioners of Columbia county and their successors in office, in sums not less than one hundred dollars each, for such amounts as will, at par value, equal the par value of the shares of stock transferred, the same to have coupons attached bearing interest at the rate of six per cent., to be made payable, principal and interest, at periods corresponding precisely with those of the bonds of Columbia county already issued in payment for said ten thousand shares of stock and deliver the same to the Judge of Probate of Columbia county in payment of the stock transferred as provided in the preceding section."

Section 17 made it the duty of the County Commissioners of each of the new counties to levy and collect taxes to meet the interest and the bonds as they became due, or to create a sinking fund for the purpose. The next Legislature, in 1859, made the rate of interest to read eight per cent. instead of six, the latter being an error.

In December, 1861, the name of New River was changed to Bradford.

In February, 1861 (Ch. 1185) Baker county was erected out of the territory of New River (Bradford) county. By section 6 of the act it was "enacted that when New River county shall have received her *pro rata* share of her railroad stock from Columbia county it shall be the duty of the County Commissioners of Baker county, together with the Judge of Probate of said county, to transfer the amount of taxable property to the Judge of Probate of New River county, who shall set apart their *pro rata* share of said railroad stock for Baker county, and take the said bonds of said county on the said terms as the said New River county received said railroad stock of Columbia county."

Relators allege that New River county (Bradford) was entitled to three hundred and thirty-three shares of the stock in the said railroad company held by Columbia county on the 5th February, 1861, when the County Commissioners of Columbia demanded of the Commissioners of New River the amount, $33,300, bearing interest at eight per cent. per annum, payable principal and interest, at periods corresponding with the bonds of Columbia coounty, which demand was refused by the Commissioners of New River county, leaving the amount of $33,300 and interest unliquidated, which principal and interest amounted to $87,560.

The County Commissioners of Columbia county on the 5th February, 1861, by an order entered in their minutes

did "set apart and transfer to the county of New River three hundred and thirty-three shares of the stock in the Florida, Atlantic and Gulf Central Railroad Company," being its due proportion of the stock held by Columbia county.

On August 18,1880, the Judge of the 4th Circuit issued a writ of mandamus directing the County Commissioners of Bradford County to execute and deliver to the County Commissioners of Columbia county bonds amounting to $87,560, with coupons for interest at eight per cent.

Petitioners say that they have procured from the Comptroller' s office a certified copy of the assessment roll for the year 1861, as made by the Tax Assessor of Baker county, by which means they have ascertained that the due proportion of the capital stock of said railroad company was $6,665 at the date of the organization of Baker county, and they demand that the County Commissioners of Baker county issue and deliver to them its bonds for said $6,665 and accrued interest from December 19, 1859, making an aggregate of $16,790 in bonds bearing interest at eight per cent., payable to the county of Bradford, with coupons attached, as required by law, and to levy and collect a tax to meet the same as they become due.

Petitioners allege that they have demanded of the County Commissioners of Baker county "the performance of their duty as prescribed by the act of the General Assembly of the State of Florida of December 21, 1858, yet they and their predecessors in office have wholly and absolutely neglected and refused to execute, issue and deliver their relative share of the bonds, or any part of the same, in pursuance of the statute; nevertheless your petitioners are willing at all times to transfer and deliver to the proper authorities of said county her relative or proportionate share of the capital stock to which she may be entitled whenever

she is in a condition so to do, or the same is available." Baker county was fully organized in 1861.

They, therefore, pray a writ of mandamus to the Commissioners of Baker county requiring them to comply with their said demand.

Notice of the application having been served, the County Commissioners of Baker county made return (after demurrer overruled):

1. That Bradford county has never complied with the requirements of section 6 of the act to organize Baker county, but on the contrary that New River (or Bradford) has absolutely refused to accept the stock form Columbia county, and refused to issue its bonds to Columbia county. And as New River (Bradford) has not received any stock from Columbia there is no obligation on the part of Baker, and Bradford does not offer said stock or any valuable consideration for the issuing of bonds by Baker county.

2. That at the time said act became a law (1861) the railroad stock was of great value, and had New River then complied with the provisions of Ch. 895 (1858) New River could have set apart to Baker county stock of value to Baker, and by the refusal of New River to receive the stock allotted to her by Columbia she has now neither stock nor any other consideration to offer, but simply ask respondents to issue $16,976 in bonds without any consideration.

3. That the amount of bonds, $87,560, issued to Columbia county by Bradford under the judgment in the mandamus proceedings of August 18, 1880, embarrassed the entire original indebtedness of New River and Baker counties to Columbia county.

4. That Baker county was not a party to the mandamus proceedings betweed Columbia and Bradford, and is therefore not bound by the proceedings.

5. That the petition of relators does not show correctly the taxable property of Baker county in 1861, which, under the act of February 8, 1861, the County Commissioners and Judge of Probate were required to transfer to the Judge of Probate of New River county (Bradford), and that Baker county is not now indebted to Bradford in any amount whatever.

The return of the respondents was adjudged insufficient, and the court thereupon granted a peremptory mandamus as prayed against them. The appeal is from this judgment.

A. A. Knight for Appellants.

W. W. Wills and *A. B. Hagan* for Apellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

It is not a question open to controversy that when a political community, like a county, city or town, shall be divided and its territory reduced or set apart by legislative authority, the Legislature may make regulations not only to apportion the property of the corporate body among the new members or communities created, but to throw the obligation to pay the debts of the entire body upon the several parts in proportion to the taxable wealth of each. This was sufficiently considered in the case of the County Commissioners vs. King, 13 Fla., 451, 472. In the division of Columbia county the liability of the new counties created was preserved, and provision made for ascertaining the just proportion which should be paid by each of the existing indebtedness of the original county. New River, (now Bradford) county was one of the new counties erected from Columbia. Baker county, then a part of New River, had no existence except as a portion of the latter.

The liability of the entire property of the county to pay

its debts was preserved by the Legislature in the act providing for the organization of Baker by expressly providing that the *pro rata* amount of the railroad bonded debt of Columbia county properly chargeable to New River, should be apportioned between New River and Baker in the ratio of the taxable property remaining in each. The act of the Legislature, therefore, did not create an indebtedness and impose it upon Baker county, but intended that its due proportion of the debt should be paid by it as though there had been no division of the parent county.

It is claimed that under the present Constitution Baker county cannot issue bonds to pay its portion of this indebtedness, and especially that the Commissioners cannot do so without a compliance with the act of 1877. But this indebtedness and the obligation to pay it existed long before 1868, and no subsequent constitutional or legislative enactment can impair the obligation.

If, therefore, the county of New River (orBradford), by its proper officers, complied with the requirements of the statute in this regard, its right to demand and receive from Baker county its bonds for its *pro rata* share of the indebtedness mentioned is unquestionable.

The return of the respondents denies that Bradford county has ever complied with the requirements of the act to organize Baker county, avers that New River (Bradford) county refused to accept its share of the railroad stock from Columbia county, and to issue its bonds to Columbia county; that Bradford has not offered any such stock or other consideration for the issuing of such bonds by Baker county to Bradford.

Examining the petition of the relators we find that it is set forth that New River county refused to issue to Columbia county its bonds for the amount of stock which the County Commissioners of Columbia had set apart and trans-

ferred to New River, to-wit: to the amount of three hundred and thirty-three shares, and it is not alleged that New River or Bradford county has issued to Columbia county its due proportion of bonds as required by law, though petitioners say that they have been commanded by writ of mandamus under date of August 18, 1880, to issue and deliver the same. Further, the petitioners do not allege that they have "set apart and transferred" to Baker county its *pro rata* shares of the railroad stock as required by law, but say they are willing to do so "whenever she (Bradford) is in a condition so to do, or the same is available.

This is not enough. Bradford must have issued its bonds to Columbia before she can demand of Baker a *pro rata* contribution under the statute. It is also a condition precedent that Bradford county shall "set apart and transfer" to Baker county her due proportion of the stock before Bradford can demand the issue of bonds by Baker, Neither of these conditions have been camplied with by Bradford county, as appears by the petitioner's show.

Respondents say that they should not be compelled to issue bonds in exchange for said railroad stock, because that the stock in 1861 was valuable, and the stock transferred at that time would have been advantageous to Baker county, whereas the stock is now of no value and will not be a consideration for the issuing of bonds as it would have been if Bradford county had promptly complied with the law. To this it must be said that the obligation to pay for the stock was and is upon both counties, and the stock was the property of both counties from and after February 5, 1861, when it was "set apart and transferred" by Columbia county to New River, and it is not shown that the decrease in its value was owing to any wrongful act or negligence of New River or Bradford. And besides, it is provided in the act (section 22) under which the bonds were

originally issued in exchange for stock that no stock held by any county shall be assignable by such county until the bonds shall be paid, except in exchange for such bonds. From 1856 to 1861 Baker was part and parcel of the territory of Columbia and New River counties, and it is not to be assumed, in the absence of anything alleged to the contrary, that the people of Baker or Bradford have ever evinced a desire to possess and pay for such stock, or that the stock has ever been available to pay and cancel the bonds.

The point made by respondents that Baker county was not a party to the mandamus proceedings of Columbia aganist Bradford county is not a valid objection to this proceeding. While Baker county may not be bound by such proceedings, not being a party thereto, she is certainly bound to pay her *pro rata* of this indebtedness of New River or Bradford, and it is competent that Baker may, in a proceeding against her, show the correct amount chargeable against her.

The respondents say further that the petition does not shows correctly the taxible property of Baker county in 1861, upon the basis of which under the act of February 8, 1861, the amount of her said liability should be found. This portion of the return does not make an issue upon any fact stated by the relators, and is therefore not a traverse. The rule is that a return to an alternative writ (or as in this case showing cause upon peition filed) shall contain either a positive denial of the facts stated, or state other facts sufficient in law to defeat the relator's right. High on Ex. Rem., §460, *et seq.*; Com. Bank vs. Canal Com'rs, 10 Wend., 25.

Relators say they arrived at the *pro rata* amount of stock an bonds to be apportioned between Bradford and Baker from the assessment rolls in the Comptroller's office as certified by the Comptroller.

The act creating Baker county (1861) requires the County Commissioners of Baker county, together with the *Judge of Probate* of said county, to *transfer* (certify) the amount of taxable property in Baker county to the *Judge of Probate* of New River (Bradford) who shall set apart their share of said railroad stock for Baker county and take the said bonds, &c.

Some confusion may have been created by the recent change in the name of "Judge of Probate" to County Judge, but it is evident that the legislative intention expressed in the sixth section is that the County Commissioners of Baker county shall give to Bradford county a statement of the taxable property in Baker in 1861 in order that there may be a proper adjustment of the amount of the bonded indebtedness chargeable to Baker. In case the Board of County Oomissioners of Baker shall refuse to give such statement, it may then be considered what steps may be proper to obtain the necessary data. The Judge of Probate at the time of the passage of the act was *ex-officio* chairman of the Board of County Commissioners, and the County Commissioners under the present law are the legitimate successors to the former Board in the management of the county business. But it is unnecessary to discuss this matter further, because in the present stage of the case no judgment can be given. It is to be hoped that this unfortunate controversy may be arranged by the parties without further expensive appeals to the courts.

The judgment awarding the writ of mandamus herein is reversed with costs.

A. D. BASNET, PETITIONER VS. THE CITY OF JACKSONVILLE, RESPONDENT.

1. A common law writ of *certiorari* to quash proceedings of an inferior jurisdiction does not issue as matter of right, but on cause shown to this court, or to a Justice thereof in vacation; nor is it the duty of the court, even where a case of irregularity in proceedings is shown, properly remediable by this process, to issue it under all circumstances; nor is it the duty of the courts to quash the proceeding returned after such writ has issued and the return has been filed in all cases of illegality, irregularity, or even want of jurisdiction.

2. A common law writ of *certiorari* does not serve the purpose of a writ of error or appeal with a bill of exceptions as known to our practice. If the court has jurisdiction, and there is no irregularity or illegality in the procedure, the *certiorari* must be quashed.

Certiorari to the Circuit Court for Duval county.

The facts are sufficiently stated in the opinion.

No motion to quash was made by respondent.

Cockrell & Walker for Petioner.

John Earle Hartridge for Respondent.

MR. JUSTICE WESTCOTT delivered the opinion of the Court.

This was a proceeding before the Judge of the Circuit Court, instituted by Basnett under the fourth section of Chapter 152, Laws, and in view of the constitutional jurisdiction of the Circuit Court in cases involving the legality of any tax assessment, by which he sought to have an assessment of taxes by the City of Jacksonville against him for the year 1880 declared "illegal and not lawfully made."

The statute provides that in such case he may apply to the Judge of the Circuit Court by petition setting forth the alleged illegality, and present the same, together with

the evidence to sustain it, and the said Judge shall decide upon the same, and if found to be illegal shall declare the assessment not lawfully made.

In this case there was a petition, exhibits thereto containing the evidence submitted,answer of the city,hearing and order dismissing the petition.

The petitioner sues out a *certiorari* to this record and seeks at the hands of this court a reversal of the judgment dismissing his petition.

The first questions which present themselves for our determination are the nature of the questions which this writ presents for our consideration and the rules of practice controlling its issuance. This writ issues here not as ancillary or auxillary to our appellate jurisdiction as it is when issued to supply a deficiency in the transcript of the record of a judgment from which an appeal is taken or to which a writ of error is sued out; nor is it issued to remove a case for trial here of which we have jurisdiction. It is a common law writ of *certiorari*. Upon such writ we neither affirm nor reverse a judgment, nor try the case upon its merits. We must either quash the proceeding of the Judge of the Circuit Court or quash the *certiorari* which brings it here. 15 Wend., 205, and cases there cited; 22 Ill., 209.

And the quashing of the proceeding, the record of which is the return to this court, is not a matter of absolute right in the party suing out the writ, but there are many cases in which the court will decline to do so. 8 Mod., 331; Bacon's Abridgment, Title Certiorari A., 1 South. N. J., 387; 17 Mass., 351; 4 Pick., 25; 9 Pick., 46; 1 Coxe N. J., 318. This court has dismissed the certiorari from a Justice's court upon the ground that there was a remedy for the petitioner by appeal to, or *certiorari* from,the Circuit Court. 6 Fla., 305. The Supreme Court of New York, Judge Bronson delivering the opinion of the court, refused in the

exercise of such discretion to quash the tax lists of the several towns in the county of Allegany for irregularity. The People vs. Supervisors of Allegany, 5 Wend., 206. Nor is such writ proper issuable in the first instance except upon order; and the petition upon which it is founded is usually sworn to. Buller, J., in The King vs. Eaton, 2 T. R. 89, said: "That the rule requiring the defendant to lay a ground before the court for granting a *certiorari* had obtained since the time of Charles II., and he cited a case of that day where it was held as clear law that a *certiorari* ought not to be granted in vacation, but in open court and upon a ground shown." 6 Mass., 72; 2 Hal., 38; 6 Wend., 565; 12 ib., 292; 15 ib., 206. Says Judge Cowen in ex-parte Mayor, &c., of Allegany, 23 Wend., 284: "They," (meaning thereby the courts,) "may exercise a discretion whether it" (the writ) "shall go at all, even where a question of jurisdiction can obviously be laid hold of through a return." In this State, upon cause shown, a Justice of this court may, in vacation, allow the writ. Chapter 1626, Laws. In this State we have no statute, except the one mentioned regulating proceedings upon *certiorari* from this court. The statutes of 1840, 1832 and 1828 authorizing the writ from the Circuit Court to Justices of the Peace, except in summary proceedings under the acts of 1833 and 1877, provide that no judgment of any Justice shall be reversed on *certiorari* when the subject matter shall appear to have been within the jurisdiction of the Justice, when there has been a regular summous and the service thereon, when there shall have been proper parties, and when proper entries shall have been made on the Justice's record. What is here said as to a *certiorari* to a Justice of the Peace is simply to show the limited nature of the enquiry attending this writ where the Legislature has regulated the practice upon it. And what we have said in reference to writs of *cer-*

tiorari is said in order that the proper practice may be known and followed in the matter of their issuance in future. We do not propose to dispose of this case, however, because such practice has not been followed in it as the same result, even if the proceedings were quashed for this reason, must follow a decision of the case as presented upon the return of the Judge of the Circuit Court. In other words, our conclusion here, independent of any question of practice, is that the *certiorari* must be quashed because the return of the Circuit Court discloses that it had jurisdiction of the subject matter, and that the methods and practice followed in reaching its conclusions were in strict conformity to the statute.

What the plaintiff seeks here is not to quash the proceeding before the Judge of the Circuit Court. He alleges that there was error in the judgment dismissing his petition in that the assessment which he asked the Judge to declare illegal was upon the evidence before him shown so to be, and asks at our hands a reversal and a mandate directing the Judge to decide in that manner. We are asked to hold that upon the evidence presented he decided erroneously the question of law applicable to it. It is not pretended here that even improper testimony was admitted, or that the rules regulating its introduction were not in strict conformity to law. The question which the *certiorari* brings here is not whether, upon the evidence offered before the Judge, the municipal corporation of Jacksonville exceeded its authority in the matter of making this assessment, but whether the Judge exceeded his jurisdiction in hearing the case at all,or adopted any method unknown to the law or essentially irregular in his proceeding under the statute. A decision made according to the form of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is

as applied to facts, is not an illegal or irregular act or proceeding remediable by *certiorari*.

We cannot make this writ serve the purpose of an appellate proceeding in the nature of a writ of error with a bill of exceptions. By this remark we do not mean to intimate that a writ of error or appeal lies here. We determine that question when it arises. The conclusions are sustained by the following citations to which many more might be added: 62 Ala., 93; 23 Wend., 287; 17 Wend., 464; 20 Wend., 103; 15 Wend., 198; 7 Met., 605; 22 Ill., 105; 20 John., 438; 5 Mass., 423; 2 Hill, 9; 3 Dall., 411; 3 Strob., 29; 14 Ill., 383; 28 Ark., 87; 30 ib., 148.

A *certiorari* is appellate in its character in the sense that it involves a limited review of the proceedings of an inferior jurisdiction. It is original in the sense that the subject-matter of the suit or proceeding which it brings before the court are not here reinvestigated, tried and determined upon the merits generally as upon appeal at law or writ of error. Thus the Supreme Court of the United States speak of such writs "as writs to review the proceedings of inferior courts as a matter of original jurisdiction," and showing errors of fact is only admissible to show want of jurisdiction or serious irregularity or illegality in procedure.

The judgment of this court is, that the writ of *certiorari* be quashed and for costs for the defendant.

THEODORE T. EDGERTON, PETITIONER, VS. THE MAYOR AND ALDERMEN OF GREEN COVE SPRINGS, RESPONDENTS.

1. A common law writ of *certiorari* does not serve the purpose of a writ of error or appeal with a bill of exceptions as known to our practice. If the court has jurisdiction and there is no irregularity or illegality in the procedure the *certiorari* must be quashed.
2. The proper method of reviewing the proceedings of the Circuit Court upon a *certiorari* issued by it is not a *certiorari* but an appeal at law or writ of error, and the general rule is that where an appeal lies a *certiorari* will not be granted. The case of Haliday vs. The Jacksonville Plank Road Company, 6 Fla., 304, referred to and approved.

Certiorari to the Circuit Court for Putnam county, to which the case was transferred from Clay county on account of the Judge of the 4th Circuit being disqualified to hear it.

The facts of the case are sufficiently stated in the opinion.

No motion to quash was made.

Cockrell & Walker for Petitioner.

Fleming & Daniel for Respondents.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The town of Green Cove Springs having directed an extension of Front street upon and over certain lands of Theodore T. Edgerton ,the plaintiff in this proceeding, he filed his petition in the Circuit Court of the State of Florida for the Fourth Judicial Circuit in Clay county, accompanied by a copy of the proceedings of Mayor and Aldermen of said town authorizing such extension, praying a writ of *certiorari* directing a return of the record of such proceedings, and upon an inspection thereof for such order

as of right and according to law should be made in the premises.

The Judge of that court having been of counsel and disqualified, the case was transferred to the Circuit Court of the Fifth Judicial Circuit for Putnam county.

There are two grounds upon which he sought favorable action at the hands of the court. First, that the amount of the damages therein assessed had never been tendered or provision made for the payment thereof to him; second, because the proceedings are irregular and do not authorize the extension of Front street over and upon his grounds.

To this action the Mayor and Aldermen answered, admitting their purpose to extend the street as alleged, averring that the proceedings were conformable to law, and praying that the petition be dismissed.

The court upon hearing held that there was no error in the proceedings and dismissed the petition.

By argument of counsel the issuance of a formal writ of certiorari is waived, the transcript of the record of the judgment of the Circuit Court is agreed to be treated as a return by that court and the matters are to be reviewed,heard and determined as if said court had been duly and regularly returned under the process of *certiorari* from this court.

The case thus presented is a *certiorari* to a *certiorari*. The *certiorari* from this court goes to the Circuit Court, and it is its proceedings that are returned here. By the plaintiff, Edgerton, here it is discussed as though it was a certiorari to the town of Green Cove Springs, and the Mayor and Aldermen of Green Cove Springs treat the case in their brief as if it was an appeal at law and they were the appellees.

We had occasion in the case of Basnett vs. The City of Jacksonville,decided at this term,to state our views in reference to a common law *certiorari*. We there held that such

a *certiorari* does not serve the purpose of a writ of error or appeal with a bill of exceptions as known to our practice, and that if the Circuit Court has jurisdiction, and there is no irregularity or illegality in the procedure,the record of which is brought to this court, the *certiorari* must be quashed.

In this case the Circuit Court had jurisdiction,and there is nothing illegal in the practice or procedure adopted by it. We think that the proper method of bringing the action of the Circuit Court in the matter of a *certiorari* to this court for review is an appeal at law or a writ or error, and if this be so the *certiorari* for that reason should, as a general rule, be dismissed. 6 Fla., 304. This is the rule in many of the States. Such proceeding in the Circuit Court is a proceding according to the course of the common law, for it is principally from this source that the Circuit Court determines the effect of a common law *certiorari*, and the general rule is that a writ of error lies to proceedings had according to the course of the common law, while a *certiorari* lies in the proceedings of a different character. Again it is to be recollected that the Circuit Court in issuing a *certiorari* is exercising a jurisdiction concurrent with this court in the same manner as it does when it decides a case of mandamus or *quo warranto*.

The *certiorari* is quashed.

GEORGE WHEATON DEANS, ADMINISTRATOR OF JACOB FOREMAN, APPELLANT, VS. JAMES WILCOXON ET ALS., APPELLEES.

1. This court has jurisdiction upon appeal or writ of error to review the proceedings of the Circuit Court upon a *certiorari* to the County Court.
2. In this State, under the Constitution, a *certiorari* lies from the Circuit Court to the County Court at the suit of the heir to bring up the proceedings of the County Court in the matter of an order of sale of real estate for the payment of the debts of the intestate. The heir, while not required to be made a party to the proceedings for the sale, has such an interest as entitles him to this writ upon proper case made in discretion of the Circuit Court.
3. "It is essential to the jurisdiction of the Circuit Court, in a proceeding by *certiorari*, that the writ issue and be returned with a transcript sought to be quashed, unless the writ and return are waived."
4. In a proceeding by an administrator to sell real estate to pay debts it is not essential to the jurisdiction of the court that the administrator should, in his petition, allege in terms that it is an intestate estate. The allegation that he is an administrator, the record of the County Court in the matter of the administration, at the same time showing his appointment, and that it was an intestate estate, is sufficient as to this matter.
5. It is not necessary that the petition of the administrator should in terms allege that an estate is solvent or insolvent, as the County Court has jurisdiction to sell lands to pay debts of both solvent and insolvent estates. In the case of a solvent estate the petition alleges an exhaustion of personal assets; and in case of insolvent estates a suggestion of insolvency. In this case the petition alleges that there is no personal estate, and the court finds that the personal property is exhausted. This is sufficient as to this matter.
6. An allegation "that the lawful debts and demands existing against the estate amount to the sum of twenty-two thousand six hundred and sixty-five dollars, as appears by the schedule hereto annexed marked A. and *reference therein* made, which he prays *with the reference* may be taken as a part of this, his petition," is a sufficient allegaton of the existence of the debt when the reference in the

schedule consists of an account sworn to by the parties and admitted by a former administrator to be due.

7. That a debt thus proved and admitted was extinguished by *laches* or lapse of time is not a question which the Circuit Court can determine, sitting as a court of law, upon *certiorari*, at the suit of the alleged heir to the County Court, in the matter of a petition by the administrator to sell real estate to pay debts, the creditor being no party, and the fact that the petitioners are heirs not being admitted by the administrator.

Appeal from the Circuit Court for Duval county.

This was a proceeding in the Circuit Court alleged by the appellees, Jacob Mason Wilcoxon, Redessa Minerva J. T. and Ella A. Wilcoxon, John W. and Emma E. Rusk, Samuel B. Simpson and Felix Albright, Lydia and John Steelsmith, to have been upon *certiorari*, the appellants denying that any *certiorari* had ever issued, and at every stage of the proceedings where the question could be raised protesting that no such writ had issued. For this and other reasons of similar character, which will apper in the treatment of the case, a statement of the pleadings more in detail than usual is deemed necessary.

On the 6th day of June, A. D. 1881, the appellees, by their attorneys, filed in the Circuit Court for the State of Florida for the Fourth Judicial Circuit, in Duval County, their petition, sworn to upon information and belief by one of the firm of attorneys representing them. Petitioners alleged that they were the heirs at law of Jacob Foreman, deceased, late of the county of Duval; that on the 18th day of January, 1881, George Wheaton Deans was appointed administrator of the estate of the said Foreman by the Probate Judge of said county; that on the 23d day of April, A. D. 1881, by petition in writing, he prayed said court to grant him an order for the sale of lot number eight, in block thirty-one, in the City of Jacksonville, in said county, upon the pretence that it was necessary to pay

debts of said deceased; that the said proceedings were wholly *ex-parte,* and the order granting said petition was made without notice to said petitioners; that there were no valid debts against said estate, the debts for the payment of which said order was granted were at the time the said petition was filed either paid off and discharged or long since barred; that a copy of said proceedings are hereto appended as a part of this petition.

Petitioners prayed the court to grant a writ of *certiorari* issuing from this court, directed to the honorable, the Judge of the County Court, to return to the Circuit Court the record of said matter, and that the said court inspecting the said proceedings may advise further to be done therein what of right and according to law should be done. The petition was signed by Cockrell & Walker, attorneys for petitioners, and sworn to according to best knowledge, information and belief by W. A. Cockrell.

Accompanying this petition and upon the same day a copy of the proceedings of the County Court was filed, consisting of a petition of George Wheaton Deans, filed November 15th, 1880, in the County Court of Duval county, representing that letters of administration had before that time been granted on the estate of Jacob Foreman, deceased, from that court to Elizabeth Foreman, deceased, and that thereafter letters were granted to J. P. Sanderson, who was also dead; that there was property of the said estate not administered upon, and debts due upon claims proved and probated against said estate yet unpaid. He prayed his appointment as administrator d. b. n. upon filing bond, &c. After publication and on the 18th January, A. D. 1881, such an order was made.

On the 23d of April, A. D. 1881. Deans, the administrator d. b. n., filed his petition to sell certain real estate, alleging that he was administrator d. b. n. of Jacob Foreman,

deceased; that there was no personal property of said intestate not administered upon; that the lawful debts and demands existing against said estate amount to the sum of twenty-two thousand six hundred and sixty-five dollars, as appears by the schedule hereto annexed marked A. and reference therein made, which he prays with the reference may be taken as a part of this, his petition. He then prayed an order of sale, &c.

Schedule A., filed with the petition, embraces one debt, being, as therein stated, amount due Augustus E. Bass and Job Bass, sole heirs of Elizabeth Bass, deceased, as per probated account offered and filed in the probate records of the county of Duval, State of Florida, on June 16th, A. D. 1856, and to which reference is hereby made for date and evidence of said account and amount due.....$28,620

Less amount received by Augustus E. Bass and Job Bass from said estate 6,555

Balance due $22,065

Estimated expense of sale, Probate fees and commissions 600

$22,665

By reference to the records mentioned, which are attached to this record, we find an account in which Foreman is charged by the estate of Elizabeth Bass with 1,050 bales of cotton valued at $42,000

Credited by expenses of plantation $9,000

Credited by expenses of minors, J. and A. E. Bass 1,200

Credited by commissions ..... 3,180—$13,38

estate of Bass $28,6

and A. E. Bass befor

Louisiana.

this affidavit these parties alleged that they are the sole heirs and representatives of Elijah Bass, deceased, late of the Parish of Concordia, Louisiana; that during their minority Dr. Jacob Foreman, deceased, intermarried with their mother, Elizabeth Foreman, now a widow; that the said Foreman became by law their co-tutor, and as such took possession of the whole estate of their deceased father, which consisted of a cotton plantation and slaves in Louisiana, sold and received the crops therefrom during the years 1836, '37 and '38; that the said Jacob Foreman gave no bond for his faithful administration of said estate, and rendered to affiants no account thereof; that said Foreman suddenly and secretly left the State of Louisana in 1838 and 1839 largely indebted to affiants, then minors, as the heirs of Elijah Bass, deceased; that the foregoing account against the estate of said Foreman is, to the best of their knowledge and belief, true and correct, and that the balance of $28,620, as therein shown, is amount due affiants on 20th December, A. D. 1838, as heirs of said Elijah Bass, deceased, as nearly as can now be ascertained. This affidavit is dated June 9th, A. D. 1856.

Following this affidavit is a statement of Elizabeth Foreman, the then administratrix of the estate of Jacob Foreman, dated June 10, 1858, stating that she had carefully examined the foregoing claim of the estate of Elijah Bass against the estate of Jacob Foreman, showing a balance of $28,620; that she had examined the evidences in support thereof and found said claim to be correct and a just claim in behalf of Job Bass and Augustus E. Bass (sole heirs of Elijah Bass, deceased,) and that no part of said claim has been paid to them. This statement closes by an approval of the claim and a statement that she has no objection to the payment thereof in due course of administration. Following this paper, but without date or file mark, is a pe-

tition for the sale of the real estate of the Foreman estate signed by J. P. Sanderson as attorney in fact for Elizabeth Foreman, administratrix. The sale is sought to pay debts upon the ground of insufficiency of the personal property to pay the debts. In the schedule of debts attached to this petition is embraced this claim of $28,000, and from the account of the administration it appears that on the 20th of October, A. D. 1856, a payment of $3,000 was made upon it.

It appears from other papers on file that after this time J. P. Sanderson was appointed administrator, and the present administrator d. b. n. alleges his death in his petition for appointment.

Following this is a schedule of the land sought to be sold by the present administrator d. b. n. valued at $3,500. Then we have the order of the Probate Court authorizing the sale, dated May 6, A. D. 1881. This order recites, "and it appearing by said petition" (meaning the petition for authority to sell) "and the schedule annexed thereto that there are debts against said estate and no means of paying the same, or any part thereof, without recourse to said real estate, the personal property of said estate having been exhausted. It is therefore," &c., continuing the order for the sale.

Upon the 13th day of May, A. D. 1881, we have in the record of the Probate Court an entry reciting that the appellees represent that they are the heirs at law of Jacob Foreman, deceased, and as such pray an appeal to the Circuit Court from this decree authorizing the sale of the land. The petition with the record stated were filed in the Circuit Court on the 6th of June, A. D. 1881. Upon the petition we find an order of the court directing a *certiorari* to issue as prayed for. Upon the same day, but whether filed before or after this order we are unable to

say, the administrator and appellant here filed a petition and moved to quash the proceedings upon grounds as follows: That the parties named had neither signed it nor sworn to it; that they were not parties in the court below; that there are no sufficient grounds set up for a *certiorari*, and that the alleged parties, if they have rights, have remedies both at law and equity. Upon the same day the appellees here, filed an amended petition purporting to be signed by themselves, which petition was sworn to upon information by A. W. Cockrell, one of their attorneys, alleging that they were the heirs at law of Foreman, reciting the appointment of Deans as administrator, his filing a petition to sell the land mentioned; that said proceedings were wholly *ex-parte;* that the order of sale was made without notice to them; that the petition failed to set up the facts which authorize said sale; that the order authorizing the sale fails to show that the facts upon which the court was authorized to grant an order for the sale of the said real estate were established to the satisfaction of said court as required by law; that there were no valid debts against said estate, and that the debts referred to in said petition of the administrator for the satisfaction of which said order of sale was made, were at the time and long before said petition was filed, either paid off and discharged or long since barred. The prayer was for a *certiorari.* Appended to this petition is what purports to be an affidavit of James Wilcoxon purporting to have been taken before a Justice of the Peace on the 23d of May, A. D. 1881, in the State of Ohio, alleging that he had married the sister of Jacob Foreman; that he was acquainted with his family, and that the following (naming the appellees) are his heirs.

The appellant upon the same day filed his motion to quash the petition upon the grounds that it was not shown

to or signed by the parties; that they were not parties to the proceedings in the Probate Court, nor do the records of the County Court show that they have any interest in the estate; that if they have any rights they have remedies both at law and in equity; that the paper purporting to be an affidavit is not properly verified; that the petition does not set up facts sufficient to authorize the issuing of a *certiorari*. This motion was overruled.

Folowing this and upon the same day the return of the County Judge was filed. The return is prefaced with the words: "In response to the mandate of the honorable the Circuit Court in this cause." The return consists of a certified copy of the proceedings relating to the sale of the land upon the petition of Deans, the administrator, and the original paper in the matter of the estate of Foreman referred to in the petition for the order of sale.

Upon the filing of this return the administrator and appellant moved to quash it upon the ground that it was made without the intervention of a *certiorari*, and because it was otherwise improperly made. There seems to have been an order made to proceed to hearing, but the record does not disclose it. At any rate we find the appellant excepted to such an order upon the ground that a writ of *certiorari* could only be made returnable and hearing had in proceedings of this character in term, and that the court could not hear and determine the matter in vacation. On the same day the final order of the Circuit Court was made. In that decree the court recites: "Return to the order upon writ of *certiorari* heretofore granted in this cause having been duly made to this court." The order was that the motions of the administrator be denied, and that the decree of the County Court authorizing the sale be vacated and annulled.

Attached to the transcript of the record of the judgment of the Circuit Court, and filed as a part of the record of the

matter of the administration of the estate of Foreman in the County Court, are almost one hundred and fifty pages of matter embracing appraisements and other matters. Reference to this portion of the record has already been made, so far as it shows the status of the debt upon the existence of which, together with the exhaustion of personal assets, the jurisdiction of the County Court was brought into operation for the purpose of directing the sale ordered.

This is part of the record, and to the extent it is necessary to refer to it we shall do so without inserting here or elsewhere, alluding to other portions which, while they properly accompany the transcript of the record of the County Court in the matter of the administration of the estate, being a part thereof, yet a large part of the matter has no material bearing upon the matters involved in this appeal.

From the order named, vacating and annulling the proceedings of the County Court, this appeal is taken.

The errors here assigned are:

First, That no *certiorari* ever issued from the Circuit Court, and none appears in the transcript of the record.

Second, That while the return of the County Court recites that it is made in obedience to a mandate of the Circuit Court, no such mandate appears in the record.

Third and fourth, That no order was made upon the amended petition for the issue of a writ of *certiorari*, and that the proceedings of the Circuit Court were extra judicial, irregular and void.

Fifth, That a writ of *certiorari* could only be returnable to a term of the court, and could not be heard in vacation.

Sixth, That the allegations in the petition did not constitute a sufficient ground for granting a common law *certiorari*.

Seventh and eighth, That neither of the petitions were properly sworn to, nor were they signed by the petitioners.

Ninth and tenth, That it does not appear that the alleged petitioners were parties to, or interested in, the proceedings in the County Court, or if interested that they would be concluded in their rights by the proceedings in said court, and that if they had any rights they had remedies, both at law and equity.

Eleventh, That it does not appear by the record of the County Court that the debt had been paid, barred, or in any way dicharged; but the contrary, and that the debt was admitted.

Twelfth, That the County Court had jurisdiction, and the proceedings therein were according to law and should not have been vacated.

Thirteenth and fourteenth, That the record of the proceedings in the County Court is regular; that nothing *dehors* thereto can be considered upon *certiorari*, and no illegality or irregularity of proceeding is shown.

Geo. Wheaton Deans for Appellant.

That an appeal lies to this court from the judgment of the court below in proceedings in *certiorari* we hold and cite: 22 Ill., 107; 30 N. Y., 72; 44 Ala., 478; 65 Maine, 160.

We hold that the proceedings which, by the record, appear to have been holden before J. M. Baker, Judge of and in the Fourth Judicial Circuit of Florida, were null and void, irregular and extra judicial in that—

First, The petition for the issue of the writ, and upon which the writ was ordered, did not allege grounds sufficient upon which the writ could issue; for that the petition did not allege that the errors complained of appear by the record of the proceedings. Emery vs. Brown, 67 Maine, and cases there cited.

Said petition did not allege that the petitioners were par-

ties to the proceedings in the County Court. nor does it appear by the record in the County Court that they, or any of them, were interested in the proceedings therein; and unless such be the case, as by the record aforesaid appearing, they had no right to the writ, and it is only parties to the proceedings who can bring the writ of *certiorari*. Hilliard New Trials, 552; 42 Barbour, 530; Powell, Appellate Proceedings, 347, 348; 45 Barbour, 164.

Further—A *certiorari*, where the defect does not appear upon the face of the record, and the application alleging it is not verified, will not be granted. 22 Ind., 73.

The petitioners do not appear by the record from the County Court to be parties to, and they cannot be permitted in this proceeding to show that they were interested in the judgment of the County Court sought to be set aside, as the writ of *certiorari* can present only the record, and nothing *dehors* the record can be shown to obtain it. 49 Maine, 417; 23 Ark., 107.

Further—The truth is that neither the original petition nor the amended petition are verified by sufficient affidavit in that the original petition was not verified at all by the petitioners, or either of them, and the affidavit in the amended petition is of no effect, the authority and power of the party before whom it purports to have been taken to act as a Justice of the Peace, or to administer an oath, not being duly authenticated. 21 Geo., 207, 213; Tidd's Prac., 180.

And by the common law an affidavit of petitioner is necessary in all civil cases in *certiorari*. 7 Cowan, 538.

Further—The record in this court does not show that no writ of *certiorari* issued in the proceedings, and, without the issuance of the writ, all proceedings were null and void. The record must show that the writ was issued. 30 Ark., 532.

Further—The record in this court does not show that any return was made to any writ of *certiorari,* nor does the record show any mandate to the County Court or Judge in connection with the proceedings; and without a writ and return thereto there was nothing before the Circuit Court, or the Judge of said court, upon which to base the judgment.

Further—Supposing any writ had issued, it could have been made returnable to a higher court only, according to the rules and practice in this State, at a regular rule day of said court, and the return upon it, or to it, could not have been heard by the court in vacation except under the regular rules of practice on the law side of the court, and for this reason, among others, the judgment rendered was extra judicial and void. 1 Overton, 81 and 368.

The common law writ of *certiorari* (and in this State the common law writ only obtains) runs only to the jurisdiction of the court whose proceedings it is sought to revise, and the regularity of its proceedings. Tidd's Practice, 398, and note on second page; 30 N. Y., 72; 54 Barb., 589; 44 Ala., 478; 28 Wis., 270.

Neither the *merits* of *the case* nor *conclusions* of *fact* can be *considered.* 32 Barb., 131; 14 Cal., 479; 13 Penn. St., 389; 12 Minn., 78; 11 Mich., 353; 18 Ill., 324.

There was no order for any writ to issue made upon the amended petition, or any action taken upon it by the court or Judge, as appears by the record, and its form or substance cannot be considered material in this court.

The motion which appears by the record to have been made to dismiss the petition for the issue of a writ of *certiorari* should have been allowed; also the motion which, by the record, appears to have been made to quash the proceedings, and return made, it not purporting to have been made on a return to a writ, and to have been made without

the intervention of a writ of *certiorari,* should have been allowed.

The record sent up from the County Court shows the court had jurisdiction of the subject matter under the statutes of the State of Florida, (and this was a proceeding in rem.,) and that its proceedings were regular; but we hold that, as before stated, there was no proper and sufficient petition for the issue of a writ of *certiorari,* no writ issued, no return therefore to any writ, no legality in the proceedings, and no jurisdiction of the Circuit Court, or the Judge thereof, under the circumstances, to entertain the proceedings or render any judgment upon them, and that if the contrary was the case the record of the County Court would show the judgment appealed from to be wrong, and that it should be reversed.

Cockrell & Walker for Appellees.

The order of the Probate Court, based upon the petition of the administrator granting the sale, is erroneous. The petition is defective in—

1st. It does not show whether Foreman died testate or intestate.

2d. If testate, it does not show whether any authority was conferred by the will to sell for the payment of debt.

3d. It does not show whether the estate is solvent or insolvent; and

4th. It does not allege affirmatively that in fact *debts exist* against the estate.

Test the sufficiency of the petition by demurrer and what issue of fact is raised by the petition? The existence, or non existence, of debts is not put in the issue; the only issue presented by the petition, the only issue determined by the court, was that the *schedule* annexed to the petition *exhibited* memoranda of certain claims, or a certain claim. Had is-

sue been joined on this allegation the pleader would have been required to prove, not the existence of the debt, but that the schedule annexed showed such a claim on an inspection of the schedule. 17 Fla., 128; McClellan's Digest, 86.

But waiving these defects of allegation, suppose the existence of debts for which the estate was liable had been distinctly alleged in the petition, was the existence of these debts "established" in the language of the statute?

The debt was an open account, based upon the alleged appropriation of crops in the year 1839, forty-two years before the petition was filed. Was not this debt shown upon the face of the petition to have been extinguished by the lapse of time? Concede the fact of presentation of this claim to an administrator in 1856 imparted to this claim the dignity of an adjudication, a solemn judgment, rendered upon proper process and pleadings, wherein a court of competent jurisdiction has ascertained the existence of the debt, and had adjudged that the administrator of the estate of Foreman should pay it, even such a judgment is presumptively satisfied by the lapse of twenty-five years. The court is referred for a full discussion of the subject to the decisions and cases cited in 59 Ala., 128, and 35 Ala., 642; 32 Ala., 75.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an appeal by the administrator from a judgment of the Circuit Court upon *certiorari*, whereby proceedings in the County Court for the sale of real estate to pay debts were annulled and vacated. We do not propose to consider the errors as assigned in the order of their assignment.

We have had occasion at this term, in the cases of Basnet vs. The City of Jacksonville and Edgerton vs. The

Town of Green Cove Springs, to announce our views upon the general subject of proceedings upon a common law writ of *certiorari,* and, as in this case, the question is involved, we deem it proper to state that we have no doubt of our jurisdiction upon appeal to review the proceedings of the Circuit Court here; such is the practice in the courts of every State where a like jurisdiction to that of this court exists.

Believing that there is no doubt of our jurisdiction to review this judgment of the Circuit Court upon appeal, the first question which meets us upon opening its record is whether it has jurisdiction of a *certiorari* to the County Court to bring up the transcript of the record of its judgment in the matter of a sale of land to pay debts of a decedent upon the petition of the administrator.

In the State of Massachusetts where there was a statute somewhat similar to that of this State, (Chap. 1627, Laws,) which gave an appeal to the Supreme Court, that being constituted the Supreme Court of Probate, to *any person,* (in our statute the appeal is given to *"any party,"*) aggrieved by any decree, order or denial made by the Probate Court, it is held that a *certiorari* does not lie from the Supreme Court to the Probate Court.

In this case the judicial system of Massachusetts is likened to that of England, and the distinctions prevailing between the eclesiastical and temporal courts in England are deemed to be operative in Massachusetts—this conclusion reached from a review of the early judicial history of that State. Chief-Justice Shaw, speaking for the court, says of the jurisdiction of the temporal and spiritual courts in England: "That each jurisdiction acting within its proper sphere was cautious not to encroach on the proper and just jurisdiction of the other, and for that reason the secular courts never interfered by way of writ of error or

certiorari or mandamus processes, devised to re-examine and affirm or reverse judicial decrees; but merely by writs of prohibition and other process designed to restrain and prevent them from the exercise of a jurisdiction not conferred upon them."

Of the Probate Courts in that State he remarks that under the judicial organization there "the judicial proceedings in matters of probate were wholly independent, subject only to the appellate jurisdiction," and that "thus the distinction and entire separation between the jurisdiction of the ordinary or ecclesiastical court and that of the common law courts, with which all those conversant with the law and practice of England were always familiar, became as well settled in this province (Massachusetts) as in England." This decision of the Supreme Court of Massachusetts is cited with approbation in In re Haney, 14 Wis., 421. In the Court of Appeals of Maryland in the case of Durham vs. Hall, 3 Harr. & McH., 352, a *certiorari* to the Orphans' Court was quashed in 1795, while in 1793 the court determined "that no writ of error will lie to the Orphans' Court from the general court, but that a *certiorari* will." We find no explanation of this apparent inconsistency. Under an early statute of New Jersey all final sentences and decrees of the Orphans' Court where no appeal is given to the prerogative court were subject to removal by *certiorari* into the Supreme Court. Pennington's Reports, 914; 4 Halstead, 70. Such practice has prevailed in the State of Georgia, (T. W. P. Charlton's Reports, 151,) under the 6th section of the third article of the Constitution in force in 1808, and we find in the Supreme Court of Alabama a case in 1844 (Cawthorne vs. Weisinger, 6 Ala., 717, Judge Ormond delivering the opinion,) in which *certiorari* is suggested as the proper remedy by which a creditor "who may conceive himself injured by a rejection of his claim may re-

move the record into the Circuit Court and have the question reconsidered."

It is thus apparent that there is not perfect unanimity in the views entertained by the courts upon the subject, and that independent of some statutory or organic provision authorizing a *certiorari* to the Probate Court, it is at least doubtful whether the writ lies in such case. In this State we think there is little room for doubt upon the subject, as by the express terms of the Constitution the jurisdiction of the County Court in probate matters is "subject to the direction and supervision of the appellate and equity jurisdiction of the Circuit Court as may be provided by law." We know nothing in the history of this State from which such a line of limitation of powers between the Probate Court and the other courts can be insisted upon as was the case in Massachusetts.

The obvious intent of the Constitution of this State is to make the County Court, in the exercise of this jurisdiction, subject to a general supervisory and directory as well as appellate power of the Circuit Court, and we think that whenever a writ of *certiorari* is the proper remedy to correct an existing evil in the Probate Court, the power of the Circuit Court to award it exists.

This brings us to the question whether the alleged heirs at law, not being parties to the proceedings to sell the real estate in the County Court, can have this writ to quash such proceeding.

As to an appeal or writ of error it is the rule that a party to the proceeding can alone prosecute it. We have examined all the cases upon the subject which we could find, and while we are left in some doubt upon the subject we think that the heir has such an interest in the subject that he is entitled upon a proper case shown in the discretion of the court to a *certiorart*. 33 Mich., 526; 12 Wend., 234; 3 Mass., 229.

The next question here is, whether the Circuit Court obtained jurisdiction of the subject-matter, there being in the record no writ of *certiorari* as is alleged by appellant. By reference to the case as stated it will be found that upon the filing of the petition with a partial record of the County Court in the matter of the estate of Foreman, the court endorsed on the petition, "let writ of *certiorari* issue as prayed." The return of the County Judge commences thus: "In response to the mandate of the honorable the Circuit Court in this cause." and the Circuit Court prefaces the final order with the words: "Return to the order upon writ of *certiorari* having been duly made to this court," &c.

The plain result from this record is, that while the court directed a *certiorari* to issue what did issue was according to the return of the County Court a "mandate," and according to the recital of the Circuit Court what it did issue was "an *order* upon a writ of *certiorari*." We do not find this order nor do we find a mandate or a writ of *certiorari* in the record, and we find the appellant here protesting and asserting at every stage of the proceeding that no such writ issued. The original writ of *certiorari* should always be sent to the Circuit Court with the return of the tribunal or officer to whom directed. Such is the rule governing a writ of error and the same rule obtains as to a *certiorari*, as there is no difference in this respect between the practice upon these writs. 6 Wall., 355; 22 How., 88.

It has been held that "where a writ of *certiorari* has been ordered by the Circuit Court or Judge, but not issued or returned with a transcript of the record, there is nothing before the court for adjudication though the case be docketed," (21 Ark., 264,) and that "it is essential to the jurisdiction of the Circuit Court in a proceeding by *certiorari* that the writ issue and be returned with a transcript of the

proceeding sought to be quashed, unless the writ and return are waived." 30 Ark., 148; 23 Ark., 107. As to the form of the writ and its service, see 2 Evans' Pleading, 413; 9 Wheat., 526; 6 Pet., 166; 4 How., 590; 91 U. S., 146. Here nothing was waived, and as no writ of *certiorari* appears in this record, we think the court should not have proceeded without it to hear and determine the case. For this error we would be obliged to reverse this judgment, but as the matters involved in the appeal have been discussed by the parties, and as our judgment upon a review of the record is consistent with the judgment which would follow the want of a writ of *certiorari*, we will examine the matter as presented.

In this court, as we understand the view of the appellee, he maintains the correctness of the judgment of the Circuit Court upon two grounds.

The first is that upon the face of the return the County Court acted without jurisdiction; and the second is that the debt alleged to exist was a stale claim.

The proceeding in the County Court was a petition to sell real estate to pay debts. As to the matter of jurisdiction, it is insisted, first, that the petition is defective in that it does not show whether Foreman died testate or intestate.

From the record of the County Court it abundantly appeared that the party filing this petition had been appointed administrator *de bonis non* of the estate of Foreman. The requirement of the statute is that the executor of administrator shall file his petition under oath, setting up the facts which authorize the sale, and if the petition purports to be filed by an administrator, and the evidence of his appointment is upon the records of the court, and he is appointed by that court, as in this case, certainly no additional evidence of the appointment is necessary, nor is there any

necessity of any other allegation than that he is the administrator. It is not necessary that the administrator should append as an exhibit to each of his acts in the County Court a certified copy of his letters in order to give validity to the the action of the court. The record here certified to the County Court shows his appointment, and the allegation that he is administrator, and the record of the administration of the estate before the Circuit Court disclosed that while there may have been a will, it was treated and held void and an administrator was appointed.

The second objection is that if the estate was testate it does not show whether any authority was conferred by the will to sell for the payment of debts. As we have said, the proper appointment of the administrator appears, and that negatives the existence of any valid will. In addition to this it may be said that the appointment of Deans as administrator, and that he was such administrator, is alleged and admitted by the petitioners in their petition for a *certiorari*.

The third objection to the jurisdiction is that it does not set up whether the estate was solvent or insolvent. No such allegation is required by the statute to be in the petition. Sec. 4, Chap. 1732, Laws. If the jurisdiction of the County Court to sell the real estate of decedents was restricted to solvent estates, the necessity of an allegation of solvency as a jurisdictional fact might perhaps be insisted upon, but the jurisdiction of the County Courts exists to sell the land of both solvent and insolvent estates. It is only necessary as to this particular matter that it appear that there is an estate, and if the facts, the existence of which is necessary to give jurisdiction in either a solvent or insolvent estate, are set up in the petition, it is sufficient. In this case the allegation is that there is no personal property of said intestate, and the court in its final order finds that the personal property was exhausted.

It is insisted further that the petition does not allege affirmatively that in fact debts exist against the estate. The allegation in the petition is that "the demands existing against said estate amount to the sum of twenty-two thousand six hundred and sixty-five dollars, as appears by the schedule hereto annexed marked A. and reference therein made, which he prays with the reference may be taken as part of this petition." We find schedule A. to be an account made out in favor of Augustus E. Bass and Job Bass, for the sum stated, and as an evidence of his correctness there is a reference in the body of it to the proof of the claim in the records of the estate; that proof is detailed in the statement of the case. The claim had been admitted by the administratrix. The petition sets up that this is a lawful debt and demand existing against the estate, and makes the claim as presented and the proof of it a part of the petition. This is clearly a sufficient allegation of the existence of the debt. It not only alleges its existence, but lays the proof of it before the court.

We had occasion to examine these jurisdictional questions in the case of Hays' Administratrix vs. McNealy, 16 Fla., 409; Emerson vs. Ross, 17 Fla., 122, and Price *et. al.* vs. Winter, 15 Fla., 103, and the conclusions there reached sustain our views here expressed.

The last ground upon which the judgment of the Circuit Court is sought to be sustained here is that the debt was existence of the debt. It not only alleges its existence, but

We do not propose to enter upon an examination or discussion of the cases cited upon this subject, or the principles of equity which prevail in respect to it.

In this case the administrator denies that these petitioners are the heirs at law of Foreman. He affirms the existence of this debt, and seeks to sell real estate to pay it. These petitioners allege that they are the heirs at law of Fore-

man, and while not denying the original existence of the debt allege that it is a stale claim. In the meantime the creditor, the existence of whose alleged debt is being made the basis of all these proceedings, is no party to the proceeding. We have had occasion at this term to examine to what extent the powers of the Circuit Court exist and its jurisdiction upon a *certiorari*, in the cases of Basnet vs. City of Jacksonville and Edgerton vs. Green Cove Springs. It does not extend to the determination of this question of stale claim, nor do we see how the fact that the petitioners are the heirs at law of Foreman can be made an issue or determined in this proceeding. It was not in issue in the proceedings in the County Court, and we cannot see how, upon a writ of *certiorari*, such a matter can be determined.

If the administrator is guilty of a *devastavit*, or if he is paying or seeking to pay debts which he should not, there is certainly a remedy, but that is not a *certiorari*, which, as a general rule, only goes to jurisdiction and legality or regularity in procedure. There are some cases which go beyond this, (29 Wis., 444; 69 N. Y., 411;) but even if the doctrine as thus modified is correct, this case is beyond it.

Judgment reversed, and the case will be remanded with direction to dismiss the petition.

MOLLIE SAMS, ET AL., APPELLANTS, VS. HANNAH KING, ET ALS., APPELLEES.

1. That there is no bill of exceptions or an incomplete one in a record is not ground for the dismissal of an appeal or to strike the case from the calendar. There may be errors apparent upon the record other than those arising upon exceptions.
2. Where a bill of exceptions, apparently regular, is signed as required by law, an allegation of counsel unsupported by proof that since

the original bill was signed there have been "interpolations" will not authorize the dismissal of the appeal.

3. Where papers are referred to in the bill of exceptions filed in the Circuit Court, with sufficient certainty to identify them, the insertion of the papers in extenso in the record prepared for this court is proper.

4. Where the books of the Assessor of Taxes are introduced in evidence in the Circuit Court it is not necessary to copy the entire book in the record sent here. It is sufficient to insert such portion of the book as it was introduced to establish, or was deemed pertinent to the questions sought to be raised, or the original may be brought to this court as authorized by the rules of practice. Where neither the part deemed pertinent to the question sought to be raised, nor the books accompanying the record, are sent to this court, the proper course is to award a *certiorari* to bring them up.

5. Time having been given during the term at which the case was tried to prepare and tender a bill of exceptions, and the Judge presiding at the trial having gone out of office, it is proper and legal for his successor to settle and sign the bill. (Hays, Adm'r, vs. McNealy, 16 Fla., 406, referred to and approved.) Upon a tender of the bill to such successor, and his refusal to sign it in the presence of three parties who were present at the trial, it is proper for them, under the rules and statute, to sign it if it correctly presents the testimony and proceedings according to their recollection.

6. A bill of exceptions, regular in form, properly prepared and attested according to law, imports verity; and its truth cannot be questioned in this court upon appeal by the affidavit of counsel, based upon their own knowledge, or upon the representation of others.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

John E. Hartridge and *M. C. Jordan* for the motion.

C. P. Cooper, contra.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

A motion is made in this case to strike the record from the files—first, because in the same is incorporated neither a true, complete nor correct copy or transcript of the bill

of exceptions filed in the case as the same appears of record in the court from which the appeal is taken. This is no ground of a motion to strike the case from the docket. If the transcript of the record did not contain or even purport to contain a bill of exceptions in this or any other case, it would be no ground upon which to strike the case from the docket. The error to be assigned may be the ruling of the court upon demurrer,or some other error apparent upon the record without an exception. If a copy of the true bill of exceptions is not here, the remedy of appellee, if he has any, it is through a *certiorari*. In addition to this the Clerk here certifies that the copy in this record is a true copy and there is nothing here to contradict this certificate, except the insertion of this statement, as a ground of the motion to strike the case from the docket. Two assessment books which were in evidence, as shown by the bill in the Circuit Court, are not in the bill here. The usual practice in such case is to send the books, and if they are not sent to award a *certiorari*.

The second ground is,"because there have been no interpolations in the so-called bill of exceptions since the same was signed by the so-called by-standers." If the bill of exceptions is signed in accordance with law in this case, and that is a question we subsequently examine, the simple statement by counsel, as a ground of a motion to strike the case from the docket, that there were interpolations in the bill of exceptions since it was signed, no such interpolation appearing to have been made, but the transcript of the record here appearing to be in this respect regular,is not available for this purpose.

The objection here seems to be that the bill as filed in the Circuit Court fails to insert certain papers at length, but refers to them by such expressions as "here set out agreement," "here insert tax deed," "here insert marriage

license." The Clerk certifies that he filled out such "vacancies" in the bill accompanying this record, as he was in said bill filed in the Circuit Court directed to insert,and we are satisfied that the record now before the court embraces such papers.

Two assessment books referred to as admitted in evideuce are not in the bill, but the practice has never been to copy books of this character. The practice is to send the original book or such extracts as were used in evidence.

A similar question as to indentity of papers was considered by the Supreme Court of the United States in Clarke vs. Russell, 3 Dal., 423. The Chief-Justice remarked that "the letters, though they might properly have been inserted more at large, are so referred to by words and plain intendent that we cannot doubt their being the same." This, however, like the other ground, is no basis for the motion to strike from the files.

The third ground is because the so-called bill of exceptions does not contain, and does not purport to contain, all the evidence produced at the trial of said cause.

It is not necessary in a majority of cases that a bill of exceptions should contain all of the testimony. It is necessary only when the consideration of the exception taken involves an examination of all the testimony. Here, however, the bill as signed does purport to contain all of the testimony, except the assessment books, in evidence, and there is nothing in the transcript of the record showing that it does not.

The fourth and fifth grounds are because the so-called bill of exceptions was not signed according to law, and does not conform to the rules of the Circuit Court as prescribed by the Supreme Court. It appears from the transcript of the record that after the expiration of the term of the court

at which the case was tried by virtue of a special order made in term, the bill of exceptions was prepared and the then Judge of the court in vacation was requested to sign it. Between the trial and the date of the presentation of the bill the Judge who tried the case had gone out of office and another Judge had been appointed. The Judge succeeding declined to sign the bill upon the ground that he was not informed as to its correctness, and that he had no authority of law in the premises; whereupon,in his presence, as recited by the bill,"three persons who were present at the trial of said cause, application having been made to us" (them) "by the defendant, by her attorney, to sign and settle said bill of exceptions according to the form of the statute in such case made and provided, which is done this 21st day of February,A.D. 1881." The bill of exceptions was thus signed by three persons present at the trial, and in the presence of the Judge of the court. The time for making up the bill of exceptions had been extended, and so necessarily had been extended the time for "tendering" the bill to the Judge, and the statute provides that when the bill is tendered to him for his signature, and he refuses to sign, "it shall be lawful for three persons to sign the same in the presence of the said Judge, and also that the same was presented to the Judge and he refused to sign it, which bill shall be as valid and have the same force as though it were signed by the Judge of said court, and the court shall permit the same to be filed and become a part of the record." Following the signature of the bill, the three persons signing it state that "in signing the above bill of exceptions we don't say that the above specifications of the testimony are correct, as neither of us kept any record of the testimony of the witnesses. It is based on our recollections." We do not understand what is here meant by specifications. We do understand, however, by the

bill that the parties were present at the trial, and by their statement that the bill contains the testimony as they recollect it. This is sufficient. The law does not require or expect them to keep a record or minute of the evidence.

There is an affidavit of M. C. Jordan, one of the plaintiffs' attorneys, questioning the verity of the bill of exceptions. It is only necessary to say as to this matter that the truth of a bill of exceptions cannot be thus assailed in this court. Properly prepared and attested according to law it imports absolute verity here, and its truth cannot be questioned by the affidavit of appellees' counsel. The same is true of the allegation by one of the counsel that Bowden, one of the persons signing the bill of exceptions, had admitted to him that he had never read it.

The power, authority and duty of the succeeding Judge in the matter of signing and settling a bill of excptions in a case where his predecessor presided at the trial, was carefully examined in the case of Hays' Admrx. vs. McNealy, 16 Fla., 406. It was there held that such duty devolved upon him.

The motion to strike the case from the calendar is denied, and a *certiorari* is awarded to bring up the two books of assessment of taxes.

REBECCA SAMS ET AL., APPELLANTS, VS. HANNAH KING ET ALS., APPELLEES.

1. Where the last clause of one section of a statute is plainly inconsistent with the first portion of the same section and with another preceding section of the statute, and this section and part of section conform to the obvious policy and intent of the Legislature, the last clause, if operative at all, must be so construed as to give it an effect consistent with the other section and part of section.

and with the policy they indicate. Hence the last clause of Section 63, Chapter 1976, Laws, which provides that "the validity of any sale for taxes under this act, or of any title acquired by, through or under such sale, shall only be affected or questioned by alleging and proving that the property sold was not subject to taxation, or that the taxes had been paid before such sale, or that the property so sold had been redeemed according to law," must be so construed as not to repeal the law in so far as it provides that until one year after the recording of the tax deed it shall be only *prima facie* evidence of regularity and title. (Sections 60 and 63, Chapter 1976, Laws.)

2. A statute providing that a tax deed shall be *prima facie* evidence of the regularity of the proceedings from the valuation of the land by the Assessors to the date of the deed, inclusive, and of the title of the purchaser, is within the admitted power of the Legislature to regulate the method of proceeding in the introduction of testimony. *Quere:* Has the Legislature power to make the deed, after it has been recorded one year, conclusive evidence of such facts, and limit the action to recover to cases in which the ground of relief is that the land was not subject to taxation, or that the taxes were paid or tendered, or that the property had been redeemed?

3. The presumption of regularity which attaches to a tax deed must prevail in its favor until evidence is given of facts which show irregularity. It is not enough to prove facts from which irregularity may be inferred. The presumption must prevail until facts inconsistent with it are shown. The testimony of the Clerk of the Circuit Court that he had, at a previous date, examined the records of his office and did not think that there was any record of the tax sale, but that he would not, without further examination, swear to the fact positively, is not sufficient to overthrow the presumption of regularity, and a verdict of the jury based upon such testimony should be set aside.

4. The power of a Collector of Revenue to enforce by sale the collection of taxes continues until the taxes are collected, notwithstanding the warrant of the Assessor directs a return or report of collections upon a particular day.

5. The description of the land upon the assessment roll is sufficiently certain if, by looking at the entire roll, it is seen that the land sold is the land taxed.

6. The statute directs the clerk to make a deed to the purchaser, his heirs or assigns. The act of the clerk in making such deed to a person claiming and purporting to be the heir of the purchaser is

not a judicial determination of that fact in the sense that it is binding upon the true heir, or any party having the right to raise the question. The Legislature, by virtue of its general power to prescribe the method of collecting taxes, can impose this duty upon the clerk.

7. A tax deed for land sold for State and county taxes is properly executed in the name of the State by the Clerk of the Circuit Court for the county in which the land was situated. He is the County Clerk within the meaning of the Legislature.

8. A tax deed after sale of land due for city taxes should be in the name of the city, and not in the name of the State.

Appeal from the Circuit Court for Duval county.

The respondents sued the appellants in the Circuit Court for Duval county in ejectment to recover lot 5, in block twenty-six, in the City of Jacksonville.

The defendants pleaded the general issue, not guilty. Possession of the defendants and the execution of the deeds of the respective parties were admitted.

The evidence upon the trial was substantially as follows: For the plaintiff—Deed of I. D. Hart to Farley Sams conveying this lot.

Cataline B. Simmons, for the plaintiff, testified: That Sallie and Rebecca Sams were the aunts of Lloyd Peck; that he was an infant at the death of his mother, Farley Sams, and that his said aunts took care of him during his life-time and up to his death; that Sallie Sams requested him to divide the lot in suit between his wife and his aunt, Rebecca Sams, for taking care of his mother, Farley Sams, during her illness, and of him during his life:

Direct for defendants:

A tax deed to Mollie Sams reciting that on the first of June, A. D. 1874, a sale of the lot for State and county taxes for the year 1873 was had; that at that sale Sallie Sams became the purchaser; that before the expiration of the time to redeem expired she died, leaving Josephus Sams her sole heir, and he also died leaving plaintiff, Mollie

Sams, his sole heir, and on the 18th November, A. D. 1879, she obtained this deed from the Clerk Circuit Court Duval county in the name of the State. This deed was recorded on the 18th November, A. D. 1879.

A tax deed to Mollie Sams reciting that on the 5th January, A. D. 1874, Sallie Sams became the purchaser of the lot at a sale for taxes due the city of Jacksonville for the year 1873. On the 20th November, A. D. 1879, Mollie Sams claimed title as above stated. This deed from the city to her was executed at that date by the City Clerk in the name of the city. It was recorded on the 20th November, A. D. 1879.

A tax deed from the city of Jacksonville to C. W. Myerhoff dated December 2, 1879. The sale was had July 3, 1878, for taxes of 1877. The deed was recorded December 6, 1879.

Letters of administration to Mollie Sams on the estate of Josephus Sams, and proof of the marriage of Josephus Sams and Mollie Sams, were also placed in evidence.

Defendant Mollie Sams, for defendant swears that Sallie Sams was the mother of Josephus Sams, her husband; that he was the sole heir of Sallie, and the she, Mollie, was the sole heir of Josephus; that Sallie Sams had always paid the taxes on the lot while she (Mollie) lived with her; that Sallie had taken care of Lloyd Peck during his entire life, and that she (Sallie) purchased this property at tax sale to protect herself in the money she had paid out for taxes, for taking care of Lloyd Peck, and for the doctor's bill and funeral epenses of his mother, Farley Sams, and that she (Mollie) and Sallie Sams had offered to divide the lot with Lloyd Peck's wife and children, but they declined the proposition.

Rebecca Ryalls, the cousin of Lloyd Peck, testifies that her mother, Rebecca Sams and Sallie Sams took care of

and supported Lloyd Peck all his life. As to bills of Lloyd Peck and his mother her testimony is substantially that of Mollie Sams. She says that her mother, Rebecca Sams, built the house on the lot; that Lloyd Peck knew when the lot was sold; that he was then of age, and said he did not care if it was sold.

Upon an offer of defendants to introduce receipts showing the alleged payments they were excluded, the plaintiff excepting.

Plaintiffs in rebuttal:

Thomas E. Buckman, Clerk of the Circuit Court, the legal custodian of the records of advertisements of tax sales, stated that at a previous date he had examined the records and did not think there was any record of the tax sale for State and county taxes of the year 1873, but he was not certain, and would prefer to examine the records again before he could testify positively that there were no such records made in his office.

R. P. Moody, Tax Collector of the city of Jacksonville, and custodian of the tax books, produced the city tax books for the year 1877.

The warrant attached thereto directed the collection of the taxes on or before the first Monday in February.

He stated that he could not find the tax book of 1873; that it might be in the City Clerk's office who was absent. To this office he went, found it in custody of John S. Driggs, obtained and produced book purporting to be city tax book of 1873. To its introduction in evidence the defendant objected upon the ground that the City Tax Collector, and not the City Clerk, was the proper custodian of city tax books, and the City Clerk's office then being in charge of another, the said books did not come from the proper custodian of said book or from the proper office.

The objection was overruled.

The court held that it was proper evidence.

To this ruling defendants excepted. The bill of exceptions does not recite that it was put in evidence, and it does not appear to have been introduced. The bill simply recites that it was offered, that it was held to be admissible, and that this ruling was excepted to.

H. A. L'Engle, for plaintiff, testified that he was the Tax Collector of Duval county. He produced the State tax book of 1873, which tax book was then offered and admitted in evidence.

John S. Driggs was produced; plaintiff offered to prove by him that he was an Alderman of the city of Jacksonville; that he was not the City Clerk; that the Clerk was absent, but had left him in charge of his office, and that he had access to all of it except one part of the Clerk's desk; that he could not find any record in the City Clerk's office of city tax sales. To which defendants objected upon the ground that he was not the City Clerk or the proper custodian of the city records. The court overruled the objection, and the defendant excepted. Just here we remark that the respondents insist that the bill of exceptions is incomplete in that testimony to the effect stated was introduced, and that the bill of exceptions does not contain it. The bill as it appears here, which must be taken to be true, recites that the plaintiff produced one John S. Driggs and offered to prove by him the facts stated, but it does not appear that such testimony was introduced. If such testimony was introduced, the plaintiffs, upon the settling of the bill of exceptions, could have readily had the bill amended in that respect.

After a number of instructions given and refused, and exceptions, there was a verdict for the plaintiffs. Then followed a motion for new trial upon the exceptions reserved and upon the general ground that the verdict was

contrary to the law and the evidence, which being denied there was judgment for the plaintiffs. From that judgment this appeal was taken.

C. P. Cooper for Appellants.

John Earle Hartridge and *M. C. Jordan* for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

We have in the statement of this case omitted to insert at length all of the charges given or refused which were made the subject of exception, and which are here for review. We will refer to them only so far as is necessary to understand and explain the conclusions which, after careful examination, we have reached as to the facts in the case and the law applicable to them.

Plaintiffs were the widow and children of Lloyd Peck, who was the son and heir of Farley Sams, who derived her title from Isaiah D. Hart, the admitted original owner of the lot which is the subject of the action. This was the title established by them. Defendant's title, as claimed, is in subordination to the title of Hart and Farley Sams and against the title of the widow and children of Lloyd Peck; they claim under and by virtue of tax deeds given after sale for taxes due by Lloyd Peck.

It appears from the testimony that the lot in question was sold for taxes due the State and county for the year 1873; that such sale was had on the 1st of June, A. D. 1874, Sallie Sims becoming the purchaser; that she died leaving surving her one son, Josephus Sams, who died, leaving surving him his wife, the plaintiff, Mollie Sams; and that the Clerk of the Circuit Court, after the time for redemption had expired, and upon the 18th November, 1879, executed a deed to her for the lot so sold. This deed was

recorded on the 18th of November, A. D. 1879. Sallie Sams also purchased this lot at a tax sale had on the 5th January, 1874, for taxes due the City of Jacksonville for the year 1873, and a deed for it was executed to Mollie Sams by the City Clerk in the name of the city on the 20th November, 1879. It was recorded upon that date.

The revenue acts controlling the effect of deeds of this character provide that they shall be *prima facie* evidence of regularity of the proceedings from the valuation of the land by the Assessors to the date of the deed, inclusive, and of the title of the purchaser.

The act of 1872, (Chap. 1887, p. 44, Acts of 1872,) contained in addition to a section to the effect stated above, another section providing that no suit should be commenced to recover possession of the lands sold for taxes, unless such suit or proceedings be commenced within one year after the recording of the deed, to set aside the deed or to recover possession, except upon the grounds that the said lands were not suject to taxation, or that other enumerated facts existed.

The act of 1874, (Chap. 1976, pp. 27, 28,) which, it is claimed, controls this case, contained the sections making the deed *prima facie* evidence of the regularity of proceedings and of title, and in addition thereto it contained the following section:

"SEC. 63. No suit or proceeding shall be commenced by a former owner or claimant, his heirs or assigns, or his or their legal representatives, to set aside any deed made in pursuance of any sale of lands for taxes, or against the grantee in such deed, his heirs or assigns or legal representatives, to recover the possession of said lands, unless such suit or proceedings be commenced within one year after the recording of such deed in the county where the lands lie, except upon the grounds that the said lands were not sub-

ject to taxation, or that the taxes were paid or tendered, together with the expenses chargeable thereon before sale, and the recording of such deed shall be deemed such assertion of title, or such entry into possession by the grantee, his heirs or assigns, as to authorize such suit or proceedings against him or them as for an actual entry: *Provided,* That infants, persons of unsound mind or under guardianship, or imprisoned, may commence such suit or proceedings within one year after such disability shall cease.

"Where land is bid off by the Collector for the State the tax certificate shall be issued by the Collector to the State, in the name of the Comptroller, and if the land is not redeemed within the time specified by law, the State shall be entitled to a deed for the same, to be issued by the County Clerk in the manner provided by law, and said deed shall be issued to the State. The validity of any sale for taxes under this act, or of any title acquired by, through or under such sale, shall only be affected or questioned by alleging and proving that the property sold was not subject to taxation, or that the taxes had been paid before such sale, or that the property so sold had been redeemed according to law."

This suit was commenced "within one year after the recording" of these deeds, and for that reason the portion of the several sections of the act for the assessment and collection of revenue, which limit the right of action after the expiration of one year from the recording of the deed to cases where the land was not subject to taxation, and others therein enumerated, are not applicable here.

In this case the Judge was requested to charge that a deed "was *prima facie* evidence of title, and an attack upon the regularity and validity af the sale is confirmed to proving that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property

had been redeemed." This he refused to do, and his action is assigned as error.

By reference to the 63d Section of Chapter 1976, Act of February 17, 1874, it will be seen that the last portion of it provides in terms that the vadidity of a tax sale or of a tax title can only be affected by the proof of the facts named in this instruction.

That a tax deed under our statute is *prima facie* evidence of regularity in the proceedings to the date of the deed and of title cannot be questioned.

Numerous authorities sustain this power in the Legislature. There can be no doubt that the power to tax is an essential element of sovereignty, nor can it be questioned that the sale of the property of a defaulting tax payer, had in the manner prescribed by law, is not depriving such person of his property without due process of law.

We not think, however, that the last clause in the section mentioned can be construed in a manner to justify the instruction asked. In a previous section of this act (Sec. 60) the Legislature had expressly declared that such deed should be *prima facie* evidence of title, and in the first portion of the section in which this general and apparently unlimited enactment is made, the Legislature had limited to actions to recover, when brought one year after the recording of the deed, to cases where the lands were not subject to taxation, or the taxes had been paid or tendered, together with the expenses chargeable thereon before sale.

With the construction contended for we therefore have the Legislature enacting in the same section that one year from the recording of the deed must elapse before the action is limited to the grounds named, and also enacting that the section is thus restricted before the year expires, or the deed is recorded. To give the arbitrary construction contended for, therefore, practically repeals the

clause making the deed simply *prima facie* evidence of regularity before the expiration of the year from the recording of the deed, and at the same time does away with the requirement to record, because it gives the deed like effect whether recorded or not.

We are thus met with a clear, plain, inconsistency in this statute. If the last clause of section 63 is to be effective according to its letter, then the first portion of that section requiring the record of the deed and the expiration of a year, and that portion of section 60 which makes the deed *prima facie* and not conclusive evidence of regularity in the proceeding are useless, are surplusage, simply disfiguring the system contemplated by the Legislature. We must give effect to the intention and purpose of the Legislature in the enactment, if within legislative power. A construction which gives the latter clause of section 63 the effect to repeal the first part of that section and the first part of section 60 we think would be inconsistent with the policy of this and other States in the matter of statutes of this character, and independent of the question of the constitutionality of the clause construed according to its letter, our view is that the antecedent inconsistent clauses must be given effect to so limit and restrict the operation of the last clause of section 63 as to permit the full operation of section 60 and the first part of section 63. In other words, where the last clause of a section of a statute is plainly inconsistent with the first portion of the same section, and another preceding section and this section and part of section conform to the obvious policy and intent of the Legislature, the last clause, if operative at all, must be so construed as to give it an effect consistent with the other sections and with the policy they indicate. Thus construing the last clause of section 63 and the first part of sections 63 and 60, the only effect we can give the clause of section 63 is to limit it by

the first clause of the same section. In other words, the provisions that the validity of the sale or title cannot be questioned, otherwise than by the matters enumerated, is restricted to cases where the deed has been recorded and the limitation has become operative as enacted in the beginning of the section.

We cannot think that the Legislature, after plainly giving the right to contest the regularity of the proceedings at any time before the expiration of the time fixed for the limitation to the action, intended by general terms used in the last clause of section 63 to deny this right.

As to the power of the Legislature to thus limit the action of the claimant of the land we say nothing, as that is not this case. We simply say that the effect of the last clause of section 63, if effective for any purpose, is as stated, and not as is apparently contended for by the appellant. In other words, that it does not make the deed befor it is recorded for one year conclusive evidence of the regularity of the proceedings in all other respects than those excepted, and that as the deeds here were not recorded for the length of time required, no question as to the constitutionality of the act in this respect is involved in the case.

We think, for the reasons stated, that the court properly refused this instruction.

The tax deeds here introduced are declared by the statute to be "*prima facie* evidence of the regularity of the proceedings from the valuation of the land by the Assessors to the date of the deed inclusive and of the title to the purchaser." The decisions sustain the power of the Legislature to establish this rule of evidence. Such a statute takes away no substantial right, and emanates from the unquestioned power of the Legislature over the subject which it regulates, the method of proceeding in the introduction of evidence. Pillow vs. Roberts, 13 How., 472;

Williams vs. Kirtland, 13 Wall., 306; Freeman vs. Thayer, 33 Maine, 76; Hand vs. Ballou, 12 N. Y., 541.

The deeds being *prima facie* evidence of regularity and title, the next question which we reach is, was the testimony of the plaintiff in this case such as to shift the burden of proof upon the defendants, and if it was, did the defendants prove a compliance with all the essential requirements of the statute.

The plaintiffs maintaining that a record of the advertisement of the tax sale in the office of the Clerk of the Circuit Court was essential to its validity offered the Clerk of the Circuit Court to prove that no such record was in his office.

This witness testified that some time before the trial he had examined the records and did not think that there was any record of the tax sale for State and county taxes for the year 1873, but he was not certain, and would prefer to examine the records again before he could testify positively that there were no such records made in his office.

Is this testimony of such character as to shift the burden of proof as to this fact? The rule as announced by Judge Cooley in Wright vs. Dunham, 13 Mich., 414, is that the presumption of regularity which attaches to the deed must prevail in its favor until evidence is given of facts which show irregularity, and that it is not enough to prove facts from which an inference of irregularity may be drawn.

The evidence must be such as to exclude any reasonable presumption of regularity. The presumption must prevail until plaintiffs show facts inconsistent with it. Case vs. Dean, 16 Mich., 38; 4 Mich., 158.

The evidence here of the clerk is to the effect that he had, at a previous date, examined the records, and did not think there was any record of the tax sale, but he would not testify positively before he made another examination.

The search that he made, it is evident, was not thorough, and he did not and would not say that there were no such records in his office. This evidence is clearly insufficient to destroy the presumption of regularity, and to the extent that the jury based their verdict upon it, their finding was erroneous.

Whether it was essential to record such advertisement we do not determine. It is not here proved that it was not recorded.

The other objections urged are, that there was no warrant to sell; that the land was improperly described, and that the record showed that the tax had been paid. The assessment book is before us. It has a warrant drawn as the statute requires. The description of the land is sufficiently certain, looking to the entire roll to show what is intended, and we cannot, after a most careful examination of the record, see any evidence even intimating payment of the tax. Another objection made in the brief of the respondents is that the evidence shows that when the sale was had Mollie and Rebecca Sams were living with Lloyd Peck, and that he was reduced to a state of imbecility from strong drink and long and continued sprees.

We find no such testimony in this record. Another objection is that there was a trust relation existing between the parties. It is only necessary to refer to the testimony as it appears in the case as stated and in the bill of exceptions to say that there was no evidence of any such relation. Another objection urged is that the time limited in the warrants attached to the assessment books had expired before the tax sales were made. There is nothing in this objection.

A warrant specifying the time in which payment of sums collected are to be paid over does not prevent the officer from continuing his duties and enforcing by sale his collections

thereafter. Hilliard on Taxation, 405; Homer vs. Cibley, 14 N. H., 99; Smith vs. Messer, 17 N. H., 420. In 14 N. H., Parker, C. J., in the case cited, says: The direction to make a return by a particular day did not terminate the authority to collect the tax. It cannot be considered as having any further effect than a direction to return the warrant by that time.

It is insisted also that the deeds "were not upon their face in accordance with the tax certificates of such sales as were therein recited, and that the clerks of the county and city had assumed judicial functions in determining that Mollie Sams was entitled to tax deeds as the alleged heir at law of Josephus Sams and Sallie Sams, the latter having been the purchaser at the tax sales."

The tax deeds alluded to recite the purchase by Sallie Sams, her death, leaving surviving her Josephus Sams, her heir, and his death, leaving Mollie Sams, his heir, surviving. She was the party to whom the deed was to be made by the officer whose duty it was to make it. Under the statute the clerk was required to make to the person purchasing, his heirs or assigns, the deed, and his act here in this respect was entirely regular. What may have been the result if, in fact, she was not the heir entitled to the deed under the statute, is a question not here presented. We are unable to see the ground of this objection. If the power of the Legislature to impose this duty is denied, we have to say that the duty imposed upon the clerk here belongs to a class of duties which the Legislature can, in the exercise of its power to regulate proceedings in the collection of taxes, impose upon the clerk. It is incidental and necessary to the exercise of this legislative power, and his making a tax deed to one as the heir of another, as directed by the Legislature, is not a judicial determination in the sense that it is the act of a court having jurisdiction to ad-

judicate the question. If the deed is given to one not the heir, the act does not bind the true heir, nor can the act of the clerk be conclusive against any one having a right to enquire into the fact.

Another objection is that the tax deed of the city should have been in the name of the State.

It is true that the first clause of Section 62, of the Act of 1874, contains general language to that effect, but the whole section must be construed together, and the subsequent portion of the section and Section 61 show that this requirement is restricted to deeds to be signed by the County Clerk. The section which regulates the form of the tax deeds of cities, requires the Clerk of the City to execute them "*substantially*" in the form prescribed by the law for deeds of the State, and the deed of the city (for it is the deed of the city, and not the State,) is properly executed in the name of the city by its clerk.

It is also insisted that the tax deed of the State is void because it is executed by the Clerk of the Circuit Court instead of the County Clerk. By reference to the Constitution, Art. 6, Sec. 17, it will be seen that they are one and the same officer. The only officer known to the Constitution and the laws that the Legislature could have intended to designate by these terms was the Clerk of the Circuit Court, who is also Clerk of the County Court and of the Board of County Commissioners.

We have disposed of all questions which arise in the case in reference to the deeds of Mollie Sams. So far as the deed to Myerhoff is concerned the objections urged to it are disposed of so far as presented by the record by what is said in reference to the tax deeds to Sams and what follows in this opinion.

Defendants in this case offered to prove that Sallie Sams and Lloyd Peck at the time of the tax purchase were in-

debted to them for services and attention. The court excluded the testimony and this is excepted to. Because one man owes another money is certainly no reason to sustain a sale of the property of the party owing the debt for taxes. The court very properly excluded such matter.

From what has been said it is apparent that the verdict of the jury here was clearly contrary to the evidence, when give its proper legal effect. There were a number of charges and exceptions thereto. Without going into any lengthy examination of them, for it is unnecessary, we will only say that while they may or may not be technically correct as applied to the various matters of law to which they are applicable, still the court fails to charge with accuracy upon the two questions involved, viz: the nature and degree of proof which a plaintiff in ejectment must produce to overcome the presumption of regularity of proceedings anterior to the tax deed and of the title of the purchaser which attend a tax deed under the statute.

The judgment is reversed and the case is remanded, with directions to set aside the verdict and award a new trial.

DUNBAR J. PAUL, ET AL., APPELLANTS, VS. ALBERT FRIES, APPELLEE.

1. When several tax deeds upon the same property are held by the same party as grantee, and the eldest is good to vest title in him, the subsequent deeds are merely evidence of the payment of taxes, and give him no title, as he already had it.
2. A paper purporting to be a tax deed is not executed within the meaning of the statute so as to convey the property, unless it is attested by subscribing witnesses (under the revenue law of 1874).
3. Where in ejectment a tax deed not executed so as to convey the land is given in evidence without objection, and no point is made

either in the Circuit Court or on appeal that the deed is invalid in that respect, yet this court cannot permit such deed to have operation as a conveyance and give it effect by our silence.

4. If the plaintiff has not a legal title at the time of commencement of his suit in ejectment, he cannot recover. An equitable interest ripening into a legal title, after suit brought, cannot have relation to the former equitable interest so as to give a right of possession at the inception of the suit. And so a tax deed executed on the day of trial cannot be given effect in favor of the plaintiff, although he might have held the certificate of sale and might have had a deed before suit. The rule is otherwise as to a defendant who sets up such title to defeat the plaintiff's claim of possession. See Spratt v. Price, 18 Fla., 289.
5. When husband and wife reside upon land which is the separate property of the wife, the assessment for the purpose of taxation may be made in name of the husband as an occupant.
6. Under the revenue law of 1874 a tax deed duly executed is *prima facie* evidence of title and of the regularity of the proceedings from the valuation of the land by the Assessor to the date of the deed inclusive, and the burthen of proof to defeat such title is upon the person resisting the same.

Appeal from the Circuit Court for Duval county.

On the 14th day of September, A. D. 1880, Albert Fries brought his action in Duval county Circuit Circuit against Dunbar J. Paul, John L. Bonnell and Wm. Gruber in ejectment to recover possession of the east half of lot four in block twenty-eight, according to Hart's map of the city of Jacksonville, bounded on the south by Duval street, on the east by Liberty street, on the north by lot eight in said block, and on the west by the west half of said lot four, situated in the city of Jacksonville, Duval county and State of Florida, containing about one-quarter of an acre, claiming mesne profits to the amount of five hundred dollars.

The defendants plead not guilty.

The cause was tried on the 5th day of May, A. D. 1880, and the jury found defendants guilty of withholding the premises described in the declaration. The defendants

moved for a new trial, which was denied, and they appealed.

The bill of exceptions shows the following facts:

The plaintiff to establish his cause of action introduced a tax deed of the premises described in the declaration made and executed by Thomas E. Buckman, Clerk of the Circuit Court of said county, conveying in the name of the State of Florida to the said Albert Fries the said premises by virtue of a sale of the same made by Samuel Spearing, Collector of Revenue, on the 9th day of July, 1875, for the non-payment of taxes levied and assessed thereon as the property of Joseph Lopez for the year 1874. This deed was acknowledged, and was also recorded on the 23d day of August, 1878, but it has no witnesses.

He next introduces a like tax deed of the same premises, except the sale was made by Henry A. L'Engle, Collector of Revenue, on the 9th day of July, A. D. 1877, for taxes levied and assessed thereon as property of Joseph Lopez for the year 1876. This deed bears date the 5th day of May, A. D. 1881, and was acknowledged on that day, and has no witnesses. The cause was tried on the 5th day of May, 1881, the issue having been joined on the 1st day of November, 1880. The defendants' counsel objected to the introduction of this deed in evidence upon the ground that it was incompetent evidence not pertinent to the issue, and because it was executed at a date subsequent to the issue joined and to the demise laid in the declaration, and is not in the issue made by the pleadings. The court overruled the objection and admitted the deed in evidence, and the counsel for defendants excepted.

The plaintiff next introduces a like tax deed to himself of same premises, except that the sale was made by Samuel Spearing, Collector of Revenue, on the 4th day of May, 1876, for non-payment of taxes levied and assessed thereon

as property of Joseph Lopez for the year 1875. This deed bears date the 5th day of May, 1881, and was duly witnessed and acknowledged on that day. The same objection was made to the introduction of this deed in evidence as to the last above-mentioned deed. The court overruled the objection, and defendants' counsel excepted.

Plaintiff then proved possession of property in the defendants at the time of the commencement of the action and rested his case.

The defendants introduced first a deed of said premises from Maria Doggett to Jane Lopez dated 18th July, 1866, and recorded on the same day; second, a mortgage on same premises made by Jane Lopez and Joseph Lopez, her husband, to Phebe Fridenburg to secure $1,000, dated 22d January, 1878, payable in one year, and recorded January 23, 1878.

Third. A final decree of foreclosure of a mortgage in favor of Phebe Fridenburg against Joseph Lopez, Peter A. Lopez, *et al.*, dated May 2, 1879, directing the premises described in above-mentioned deed and mortgage to be sold and the proceeds to be applied to the payment of the mortgage debt, interest, &c.

Fourth. A master's deed from John E. Hartridge, Special Master in Chancery, of the same premises to Phebe Fridenburg, dated June 2, 1879, sold under and by virtue of the decree of foreclosure of May 2, 1879, Phebe Fridenburg being the purchaser for the sum of $570. Deed recorded 4th day of June, 1879.

H. P. Fridenburg testified: I am a son of Phebe Fridenburg and her agent in the city of Jacksonville. The property in controversy belongs to her, and defendants are her tenants; she purchased it at the foreclosure sale.

Moses J. Brown testified: I am Collector of Revenue for Duval County. I am custodian of tax books for 1874-5-6,

from which sales of property were made for non-payment of taxes. This is the official book for 1874. I find the name of Joseph Lopez and the premises above described are assessed to him. I find a warrant annexed to page 70 of this book. I know of no other warrant in my office belonging to this book.

Here follows a copy of the warrant issued on 23d October, 1874, by J. C. Greely, Assessor of Duval county, to Peter Jones, Collector, in due form, directing him to make the collections on or before the first day of February next, upon which day he was enjoined to make his final report.

The same witness proves the tax-books, assessment of the property described to Joseph Lopez, and the warrants issued by the Assessor to the Collector for the years 1875 and 1876.

Thomas E. Buckman testified to the tax sale books for the years 1874, 1875, 1876, that each one showed the premises assessed to Joseph Lopez, and had been filed in the office of the clerk is required by law; and that said books also showed the sale of said premises on the tax or assessment made against Joseph Lopez; that such sale books were endorsed as follows: "Tax sales of 1875. Filed August 12th, 1875." "Tax sales made May, 1876. Filed April 24, 1877." "Tax sales of land assessed to known owners, made 1877. Filed in the Clerk's office of Duval county, Florida, this 15th of February, 1878." Copies of so much of said several books as relates to the assessment of this property to Joseph Lopez were proved, and are made parts of the bill of exceptions, by which it appears that a poll tax was assessed against said Lopez for each year and included in the amount of the tax assessed against Lopez, but there is no testimony other than this showing whether the poll taxes were included in the amount for which the lot was sold.

The defendants then rested their case.

Gustave Muller, a witness called by the plaintiff, testified that he knew Joseph Lopez, and that said Lopez lived upon the premises in controversy during the years 1874, 1875 and 1876; that his wife and family lived with him.

To the admission of this evidence of Muller the defendant's counsel objected upon the ground that it was not in the rebuttal, and was not competent evidence at this stage of the case. The court overruled the objection, admitted the evidence and defendants excepted.

The court then at the request of the plaintiff's attorney charged the jury, among other things, as follows:

1. "If the jury believe from the evidence that when any of the assessments which are in evidence in this case were made Joseph Lopez occupied the property in question, and that he so occupied it with his wife and family, the wife being the owner of the legal title, Joseph Lopez would be an occupant within the meaning of the tax law which governed the assessment in this case." To which the defendants excepted.

2. "The deeds introduced by the plaintiff are evidence of the regularity of the proceedings from the valuation of the land to the date of the deed inclusive, and the burden is upon the defendant to prove such irregularity in the proceeding as would vitiate the deed." To which the defendants excepted.

3. "If the jury believe from the evidence that the land in question, during any one of the three years for which it was assessed, was listed to the owner or the occupant, was properly described in the assessment book, and properly valued, and the rate properly extended, and there was a default in the payment of such tax at the time required by law, and upon such default, after legal notice of the time and place designated by the law, a sale was made by the

Collector in conformity to law, and if you believe that a certificate was given to the purchaser, and that after the period of redemption expired, the lands not having been redeemed, the certificate was surrendered by the plaintiff, and that he was the purchaser named in the certificate or the assignee thereof, and thereupon a deed, such as any one of those in evidence was executed to the plaintiff, the jury must find for the plaintiff, and the burden of showing that any of these things was not done is upon the defendant, or unless the defendant shows that such proceedings did not conform to the requirements of the statutes." To which the defendants excepted.

The defendant's counsel requested the court to charge the jury, among other things, as follows:

1. "An assessment of the wife's separate estate to the husband, he living with her upon it, is void under the tax law of 1874."

2. "If you find that the property in controversy, at the time it was assessed and sold as the property of Joseph Lopez, was really the property of his wife, Jane Lopez, then the assessment and sale was void, and confers no right upon the purchaser at the tax sale."

3. "Section 55 of the tax act of 1874, under which the sales were made in the case at bar, is a mandatory requirement designed for the protection of the owner of the land which has been sold for taxes, and the filing of the exhibit of sales made six or more months after the sale was made, will make the sale void."

4. "An assessment upon the assessment book, in the hands of a Tax Collector, of a certain tax therein specified, is presumptive evidence, if not erased, that said item was included in a sale of the property afterwards for non-payment of taxes."

5. "If the jury believe that Jane Lopez was the owner

and an occupant of the property, or the owner thereof at the time of the assessment and sales for 1874, 1875 and 1876, they will find for the defendant."

The court declined to charge as in the five cases above requested, and the defendant's counsel did except separately and specifically to each refusal of the court to so charge.

The errors alleged are those included in the various objections to the evidence and to the exceptions taken in the foregoing statement.

M. C. Jordan and *J. W. Whitney* for Appellants.

Cockrell & Walker for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

The appellants assign as error, that the court admitted in evidence tax deeds executed to the plaintiff subsequent to issue joined and subsequent to the demise laid in the declaration.

Plaintiff had introduced to sustain his action a paper purporting to be a tax deed to himself, upon a sale in 1875 for the unpaid taxes of 1874. This deed was dated anterior to the commencement of the suit. If this deed conveyed any title to the plaintiff, which title remained in him at the time of his purchase of the certificates upon which the subsequent deeds were executed, such purchase and deeds, (no other claims intervening,) were merely evidence that he had paid the taxes therein mentioned, because it was his duty to pay the subsequent taxes, and he could thereby acquire no title, as he already possessed it.

If there is any importance to be given to the subsequent deeds as evidence of title, it is because the first deed, or what purported to be such, was ineffectual to give a title. No question was raised as to the execution of the first deed, but it was received without objection and treated as evi-

dence by the parties and the court. We should not here interpose any question, except that we cannot consent to sanction even by our silence such an error as the record shows in the case of this deed. *It has no witnesses to its execution.* Section 62 of the act of 1874, Chap. 1976, says: "All tax deeds shall be executed in the name of the State, shall be signed by the County Clerk, shall be witnessed by two witnesses, and the seal of the County Court attached thereto." It will be noticed that the attestation of two witnesses is one of the requisites in the execution of a tax deed, as necessary as the signature or the seal. It is, therefore, not an *executed* deed. The same is also true of the paper purporting to be a tax deed, which was offered in evidence by the plaintiff, upon a sale of the lot in 1877 for the unpaid taxes of 1876. These papers are not effectual as conveyances of the property.

The only recognized deed offered by the plaintiff to sustain his action was the tax deed dated May 5,1881, witnessed and acknowledged, issued upon a sale for the taxes of 1875 made May 4, 1876, by the Collector of Revenue for Duval county.

This suit having been commenced September 14, 1880, the plaintiff had no title by deed on that day. It is contended by the plaintiff (appellee) that the period of redemption from the sale of May 4, 1876, having expired May 4, 1877, he became at that time vested with an equitable interest in the land sold, and that the deed of May 5, 1881, vested in him the legal title pursuant to the sale, and such legal title had relation to the expiration of the time of redemption and effective as a legal title from that time.

In the case of Spratt vs. Price, 18 Fla., 289 the defendant Price obtained a tax deed after the joining of issue, and it was held that a tax deed in the hands of the defendant may have relation to the day upon which he was entitled to it,

and if such day precedes the date upon which issue was joined, the deed was admissible under the general issue. The legal title in that case had passed out of the plaintiff by a tax sale and deed and had vested in the defendant on or before the trial.

Say the Supreme Court of Pennsylvania in Heffner vs. Betts, 32 Pa. St. R., 376, 378: "If the plaintiff had title when the suit was brought, and has not when the suit is tried, he cannot recover the land against the legal owner." In that case the title of the plaintiff was divested by virtue of a judgment lien and sale on execution at which the defendant's grantor was the purchaser. In the case of Spratt vs. Price, the latter being seized of the legal title before issue joined, the plaintiff failed to recover.

Counsel for appellee here insist that the equitable interest, his *right* to have a legal title, having been perfect before suit was brought, the deed executed on the 5th May, 1881, the day of the trial, gave him a legal title which had relation to the day when he might have had a deed. They cite the case of Lynch vs. Bernal, 9 Wall., 315, to sustain this position. The case was cited in Spratt vs. Price, and sustains the doctrine there asserted. In Lynch vs. Bernal it is insisted that the rule was enforced in behalf of a plaintiff who occupied the same position as this appellee, that of a plaintiff seeking to recover land upon a title confirmed *since the demise declared upon.* This is a mistake of counsel. The confirmation of the title in that case was long before the demise laid, and the doctrine of relation did not enure to the plaintiff in that case in aid of a title acquired or confirmed after suit brought. The defendants in that case claimed a title older and superior to the *confirmation* of plaintiff's title, and the court held that the confirmation related back to the inception of plaintiff's right which antedated the defendant's title.

The case of Jackson vs. McCall, 3 Cowen, 75, also referred to by appellee's counsel, involved the question "whether a sheriff's deed executed after issue joined in the cause, the sale having been made before the commencement of the suit, can be given in evidence *by the defendant* under the general rule;" and the court held that it could. The court say: "This, therefore, is a case to which the doctrine of relation is particularly applicable, there being no strangers, or third persons, whose interest can be affected by it." And the court quoted the general rule upon the doctrine of relation ifrom Viner's Abr. Tit. Relation, 290: "Where there are divers acts concurrent to make a conveyance, the original act shall be preferred; and to this the other act shall have relation."

The case also cited by appellee in 12 Johns., 140, decides that where a patent for land dated December 4, and passed the Secretary's office December 28, by the doctrine of relation the title related back to the date, that being the day when the grant was ordered by the Commissioner of the Land Office, so as to give the plaintiff a right to recover for timber cut between the date and the delivery of the patent. But the suit was not commenced before the delivery of the patent, until which time he did not *have* a legal title.

The case of Jackson vs. Bard, 4 Johns., 230, affirms the general doctrine of relation merely, but it is not a case involving the right of a plaintiff to sue in ejectment before obtaining a legal title. Neither do the cases in 1 Johns. Cases, 85, or 3 Cai., 263, decide that a plaintiff can sue in ejectment before his legal title is vested. The case of Ridgway vs. Glover, 60 Ala., 181, involved merely the question of the power of the court to order the sheriff to correct a mistake in the description of one of several parcels of land, and the doctrine of relation was applied, upon the ground the legal title passed by the sheriff's deed and

the correction of the mistake in the deed had effect as of the date of the deed.

The only authority cited by the court was 48 Mo., 219, where a defendant had been permitted to have the sheriff's deed corrected. The law in Alabama, as given in the Ridgway vs. Glover, however, does not cover the case where no deed had been executed so as to vest a title before suit.

The question is, whether ejectment can be brought, except upon a legal title vested at the date of the demise laid or the commencement of the suit.

In Maryland, as in Florida, the distinction between common law and equity, as known to the English law, has been preserved. Ch. J. Taney, in Lessee of Smith vs. McCann, 24 How., 398, 403, says the action of ejectment is the only mode of trying the title to lands in that State. "And in that action the lessor of the plaintiff must show a legal title in himself to the land he claims, and the right of possession under it, at the time of the demise laid in the declaration, and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be." In Wait's Actions and Defences, Vol. 3, p. 10, *et seq.*, we find the subject treated and many authorities cited. The action of ejectment (says the compiler) is "founded upon the principle that the defendant in possession is a wrong-doer in withholding the premises from the plaintiff; and unless he is so at the time the latter brings his action it cannot be sustained. A present right of possession is, therefore, essential," and he must have it at the commencement of the suit.

In Taylor on Ejectment, 74-77, the same rule is stated, and a large number of cases referred to citing decisions in many States. Without reference to the cases cited in Tyler, we refer to the following: 9 B. Munroe, 143; 12 Ga., 166; 11 Ill., 547; 1 Blackf., (Ind.) 421; 3 A. K. Mar.,

131; 4 J. J. Mar., 388; 25 Miss., 177; 11 Mo., 481; 13 Ill., 251; 32 Cal., 332; 5 Har. & Johns., 155; 4 Vt., 105; 10 Wend., 414; 2 Dana, 68; 11 Gill. & J., 351; 20 Barb., 559, and see numerous other authorities cited in VI. U. S. Dig., 1st Series, 137, §61.

In Currie vs. Tibbs, 5 B. Munroe, 440, 443, it is held for the reasons before stated that a declaration in ejectment cannot be amended by adding a new demise dated subsequent to the commencement of the suit. Also to the same effect Dudley vs. Grayson, 6 B. Mun., 259.

The clear result is that a tax deed executed on a day subsequent to the commencement of the suit cannot be introduced to prove the legal title of the plaintiff and his right of possession. Under the tax certificate, after the time of redemption had expired, the plaintiff, if he was then the holder of the certificate, had an equitable right, but not an estate under which he could recover at law, until he acquired the legal title by deed, which resulted from his equitable interest by force of the statute. He was not entitled to the possession or to rents and profits until his legal title was perfected, and that was acquired only by deed.

The court, therefore, erred in admitting the deeds executed May 5, 1881, in evidence.

The Judge charged the jury that if the property in question belonged to Jane Lopez as her separate property at the time of the assessment, but that it was assessed in the name of her husband who lived thereon with her and their family at the time, it was legally assessed in the name of the husband as the occupant. The proof shows that she was the holder of the legal title, and that it was assessed in the name of the husband who lived with her upon the property.

The statute provided (act of 1874, Ch. 1976, Sec. 6,) that

"lands owned by one person and occupied by another may be assessed in the name of the owner or occupant."

The act of March 6, 1845, provides that the property of a married woman, acquired by purchase, &c., shall remain in the care and management of the husband. (McClellan's Dig., 754.) The *ad valorem* principle of taxation prevails in this State in the assessment and levy of taxes upon property. The tax is a lien upon property taxed.

In view of the language of the statute that real estate may be assessed in the name of the owner or occupant, (*i. e.*, person in possession) and that the statute gives the husband the care and management of his wife's property, the possession thereof by the family is the possession and occupancy of the husband.

We are aware that in Wisconsin it has been held that the wife's property should be assessed in her name though husband and wife reside together on the land. (25 Wis., 496,) but we think with Judge Cooley that the rule is there "applied with great strictness." (Cooley on Taxation, 278, N. 1.) We regard the assessment of the property in the name of the husband, if he is the occupant, though his wife lives with him, as a legal assessment of the property by the laws of this State.

Under the revenue law of 1874, a tax deed, duly executed, is *prima facie* evidence of the regularity of the proceedings from the valuation of the land by the Assessor to the date of the deed inclusive and of title to the purchaser, his heirs or assigns (section 60), and the burthen of proof to defeat such title is upon the person resisting the same.

In view of the result of this examination of the errors assigned we deem it unnecessary to examine this case further. Should the controversy be continued between the parties they will have opportunity to present their proofs fully and distinctly upon every controverted point.

The judgment is reversed and the cause remanded, with directions to set aside the verdict and for further proceedings according to law.

JOHN R. HOGANS, ET AL., APPELLANTS, VS. GEORGE R. APPELLEE.

1. In ejectment, defendant in possession may defend by showing legal title in another person and out of plaintiff who is claiming possession as a right incident to legal title.
2. That a deed does not upon its face show that it embraces the lot in question, or that the plaintiff does not show this fact as a foundation for its introduction, is not a good objection to its introduction in evidence. A party is not required to locate on the ground the calls of a deed before it is admitted.
3. Where the calls of a deed first give boundaries by land owned by neighboring proprietors or adjoining tracts, and afterwards by courses, distances and area, and there is an apparent conflict, deeds showing the ownership of the adjoining tracts at the time of the execution of the first deed are proper evidence, and they, with other facts tending to prove the intention of the parties, are proper evidence.
4. The acknowledgment of a deed taken by the grantee therein is void. The deed, however, is binding between the parties or their heirs, and its execution may be established by common law evidence.
5. In such case identity of person is presumed from identity of name. This upon grounds of public policy.
6. While any principles applicable to the facts in the present case which were announced in an antecedent case between different parties, should have the weight of precedent and authority, both in the Circuit Court and in this court, still, when the cases are not identical, to the extent of the difference the principles first announced cease to be controlling.
7. An original deed of conveyance does not prove itself at common law, and in this State an original deed, introduced by and coming from the possession of the defendant, whether its execution has

been acknowledged or proved under the statute of November 15, A. D. 1828, or not, is not made evidence by any statute. The certificate or acknowledgment under that act is not a common law certificate. It is altogether statutory in its character and can serve no other purpose under the statutes than that declared by the statute, which is to authorize a record thereof "in the office assigned by law for that purpose."

8. Where a deed purports to be executed under a power, the general rule is that the authority should be shown. *Quere:* Whether, if the deed is an ancient deed, the rule is to any extent modified. But however this may be, *the fact of the execution of the deed* may be shown independent of the power, and if the deed be otherwise admissible as bearing upon a question of boundary, and the act of the parties in making the deed is pertinent to the issue, upon proof of execution it should go to the jury.

9. It is proper and necessary to the intelligent consideration by this court of the testimony of expert witnesses and of such portion of the testimony as refers to plats, maps or diagrams, that such maps and diagrams as introduced should accompany the record.

Appeal from the Circuit Court for Duval county.

The deed of May 26th, 1834, was acknowledged by the grantors therein before the grantee, Isaiah D. Hart, Clerk of the County Court for Duval county, the day of its date.

The other facts are sufficiently stated in the opinion.

C. P. Cooper for Appellants.

Cockrell & Walker for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The Appellants in this case (plaintiffs below), which is an action of ejectment to recover lot one in block one hundred and thirty-six in the city of Jacksonville, claim title as the heirs of Zachariah Hogans and Maria Hogans, his wife, formerly Maria Taylor, widow of Purnal Taylor, deceased. Plaintiffs, to show their title, placed in evidence the fourth volume of American State Papers, pp. 170, 171,

containing a grant of 200 acres of land by the Spanish government to Donna Maria Suarez, widow of Purnal Taylor, "and children, heirs and successors." She subsequently married Hogans. The grant was made on the 13th September, A. D. 1816. This grant, which is called in the testimony the "Hogans' Grant," and which we will refer to in that language hereafter, was confirmed to Z. Hogans and his heirs by the Board of Commissioners for ascertaining claims and titles to land in East Florida on the 26th of April, 1824. 4 American State Papers, 171.

Plaintiffs proved that the lot in question was embraced in the Hogans' Grant, that they were the heirs of Hogans, and rested.

There was no proof of actual possession at any time in Hogans, or in his heirs, the plaintiffs. The claim therefore of the plaintiffs is based upon proof of legal title in their ancestors.

The defendant's claim here is not of a legal title in himself by virtue of any deed of conveyance. He relies upon his possession, and asserts that by his proof the legal title of plaintiffs' ancestors is shown to have passed from them to Isaiah D. Hart. See as to this question 2 Wend., 1; 3 Wash., 498; 17 Mo., 98; 27 Mo., 405.

Upon the trial there was a verdict for the defendant. A motion for new trial by plaintiffs was denied, and from the consequent judgment for the defendant this appeal is prosecuted.

The first evidence offered by the defendants is a deed from Hogans and his wife and John Taylor, Charlotte Taylor and Purnal Taylor to Isaiah D. Hart, dated the 26th day of May, A. D. 1834.

There were two general objections to the introduction to this deed. The first was that "it does not include the lot in controversy;" the second was "that the deed was not properly executed."

We do not think the first objection tenable. This is the first of a series of deeds by which the defendant proposed to show an inconsistency in the boundaries of the land described in it, and that the northern boundary in it was not to be fixed by the courses, distances and area as given by it; but as all the boundaries were also described by land lying adjacent to the land proposed to be conveyed, and the northern boundary was given as lands of the grantee, and the lot in question was alleged to be south of the lands owned by the grantee, it was admissible as tending to show that fact, and as tending to prove the alleged intention of the parties to convey the land embraced within the boundaries fixed by the adjacent lands rather than the land embraced in the named courses, distances and area.

It is difficult to conceive of a case in which this objection would be tenable, except when it appeared on the face of the deed that it did not include or relate to the premises in suit. When it does not so appear, the question is one of fact, to be determined upon the evidence. It is manifest that a party is not required to locate on the ground the calls of a deed before the deed is admitted in evidence. 48 Cal., 184.

The like answer, we think, may be given to the *same objection* to the other deeds whenever such answer is applicable.

The second objection, we think, was a good one. The acknowledgment of the deed by which it was admitted to record was taken here by the grantee. This, while it left the deed effective *inter partes* susceptible of proof of execution by common law evidence was a void acknowledgment not authorizing the recording of the instrument. (5 N. Y., 37; 6 Pet., 136; 20 Iowa, 233; 20 Maine, 413; 7 Watts, 227; 2 Saund. Chy., 630.) Even, therefore, if an acknowledgment and record of an instrument dispensed

with proof of its execution by the witnesses, or otherwise under the statute, there is no acknowledgment here.

It is insisted that this objection could not prevail here for want of proof of identity in the grantee and the party acknowledgment and record o fan instrument dispensed their names are identical, and in such case the presumption is that such is the fact. See the remarks of Cole, Justice, in 20 Iowa, 233.

The deed, however, being effective between the parties, and the claim of the plaintiffs being by descent through the grantors, the defendants might have proved (the deed being over thirty years old) those circumstances which raise a legal presumption in favor of its authenticity and due execution. See upon this subject the cases cited in 2 Phil. on Ev., 4 Am. Ed., Cowen and Hill's Notes, 477. No proof of the kind was offered. The deed stood as a naked paper. As such it was no deed in evidence, as there was no proof of it, and the objection on account of want of proof of proper execution was well taken.

This conclusion necessarily involves a new trial, as it is only through the effective operation of this deed, in the manner claimed by the defendant, that the verdict and judgment can be sustained.

It is the general rule of this court, from its foundation, not to make elaborate comments upon the testimony in a case where there is some fundamental error demanding a new trial. To do this in this case would be for us to act upon the presumption that this paper was properly executed and delivered as a deed. This we cannot do, as there is no evidence of such fact. There are, however, some general remarks which we deem it proper to make, in view of the fact that the appellants here seem to think that this case should be controlled by our decision in the case of Seymour *et al.* vs. Creswell *et al.*, decided at an early day

in January Term, A. D. 1881. (See 18 Fla., 29.) While any principle applicable to the facts in the present case which was decided or announced in that, should have the weight of precedent and authority both in the Circuit Court and in this court, still, when the cases are not identical to the extent of the difference, the principles first announced cease to be applicable. We think a great difference between the facts in the two cases exists. The deeds proposed to be introduced, or introduced here, to the extent that they tend to explain what is meant *by the parties* to the deed of the 26th of May, A. D. 1834, by the terms "bounded on the east by lands now claimed by John L. Dogget, on the north by lands claimed by the said parties of the second part, on the west by lands of the parties of the first part, (it being part of the aforesaid tract,) and on the south by St. Johns river," are admissible if properly proved. If it is a material question in any case to establish who owned or claimed to own adjoining lands at a particular date, certainly deeds of conveyance or other instruments showing the fact must be admissible, where they concern such a question of ancient boundary. But to give the instruments the effect *of deeds of conveyance* as showing *ownership* of the land, the execution should be proved as in other cases. As we understand the English rule we think some of the cases at least go much further than the rule necessary to announce at the present stage of this case. This certainly is true of the American cases. The amount of the decision in Barnes vs. Mawson, 1 Maule and Selwyn, pp. 77, 84, was that where a tract of land was known by a certain name, the extent to which that name has been applied may be shown even by general reputation, and so of the relation whether tract A lies within or adjoining tract B. See upon this subject generally, 1 Philips on Evidence; Cowen & Hill's Notes 4, American edition, pp. 220, 226; 1 Greenleaf on Evidence, notes to §301 and §302; 13 John., 346; 48 Cal., 184.

As to the deeds proposed to be introduced in this case: These deeds are original deeds, introduced by and coming from the possession of the defendant. Such deeds at common law do not prove themselves, and in this State an original deed, whether its execution has been acknowledged or proved under the statute of November 15th, A. D. 1828, or not, is not made evidence by any statute known to us. The certificate or acknowledgment is not a common law certificate, but is altogether statutory in its character, and can serve no other purpose under the statute than that declared by the statute, which is to authorize a record thereof "in the office assigned by law for that purpose." (50 Texas, 62; 2 Phil. on Ev., 4 Am. Ed., Cowen & Hill's Notes to pages 584-5, and cases cited; 9 Mass., 211; 1 Pet. Ct. Ct. Reports, 437; 3 Hal., 279, 280; 5 Ala., 300; 2 Ala., 203; 51 Ala., 340; 4 Blackf., 522; 5 ib., 79.) Where a different rule prevails it is because the statute in letter or effect makes deeds thus acknowledged and recorded evidence. This is the case in New York, Pennsylvania, Illinois and other States.

Whether, under peculiar circumstances, not existing in this case, so far as we can see at this time, the acknowledgment or proof may or may not have some effect, as secondary evidence at common law, we do not determine.

As to the deeds executed by virtue of powers of sale conferred by judicial authority: In some of the States, if the deed is an ancient deed, strict proof of the power is not required. (Judge Cooley in the case of Willets vs. Mandlebaum, 28 Mich., 522.) In other States strict proof is required. (63 Ill., 110.) But, however this may be as to the authority to execute, the fact of the execution of the deed can be shown independent of the power to do so, if the deed be otherwise admissible as to date and like matters, and in this view we think the deed, if the proof is suffi-

cient to establish the fact of execution, should go to the jury.

As a matter of course, what is said as to proof of deeds in this case, does not refer to cases where the question of fraud is involved in the enquiry before the jury.

It is apparent from the bill of exceptions in this case, that certain maps or plats from the Surveyor-General's office, which are not in the record, were in evidence. In all such cases the presence of these maps, as introduced, is necessary to enable this court to give intelligent consideration to the testimony. This, too, is essential as to original diagrams used by expert witnesses. For instance, what purports to represent the original or a digram used by witness L'Engle in this case is to be found in appellants' brief. As illustrating his argument, counsel may draw what conclusion he pleases from it, but it cannot be considered as an illustration of the witnesses' views under oath where the witness himself has drawn his own diagram. In examining the eastern boundary of the Hogans Grant, and many other questions involved herein, we have been embarrassed for the want of them in this case.

Judgment reversed and new trial awarded.

JOHN J. KNOX, COMMISSIONER, &C., PLAINTIFF IN ERROR, VS. WILLIAM B. BARNETT, DEFENDANT IN ERROR.

1. Where, by consent, there is a trial by the court, a motion for a new trial upon the ground that the finding was contrary to the law and evidence overruled, and exception thereto, this court, upon a writ of error, is authorized and required by Chapter 521, Laws, and other statutes, to review such action overruling the motion for new trial and to examine the evidence.

2. Where a general agent having a power to sell a piece of land, limited only in the method of payment, and the agent having control of the rents of a building on the land, upon a sale of the land at public sale announces, in the presence of a tenant, that the purchaser, after a named date, shall be entitled to the rents, and the special agent, upon a payment for a part of the time to the purchaser, expresses approval of it, the principal is estopped from claiming rent paid to such purchaser by such tenant.

Writ of Error to the Circuit Court for Duval county.

The facts in the case are stated in the opinion.

Geo. Wheaton Deans for Plaintiff in Error.

Cockrell & Walker for Defendant in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In this case there was a trial by the court by consent, a finding for the defendant, a motion for new trial, motion overruled, exception thereto, and judgment for the defendant.

The grounds of the motion for a new trial were, that the finding of the court for the defendant was contrary to the evidence and to the law as applicable to the evidence.

The first question presented, while we think it is one easy of solution and determined with little difficulty, is of great importance as a matter of practice, and deserves, and has received at our hands, careful consideration. That question is whether, where by consent the trial is by the court, this court can upon motion for new trial, upon the grounds stated being overruled and exceptions thereto, review the action of the court in this respect upon a writ of error.

The Supreme Court of this State, like the Supreme Court of the United Statesc, and some, not all, ofthe State courts, anterior to the statute of 1853, Chap. 521, Laws, held that

cient to establish the fact of execution, should go to the jury.

As a matter of course, what is said as to proof of deeds in this case, does not refer to cases where the question of fraud is involved in the enquiry before the jury.

It is apparent from the bill of exceptions in this case, that certain maps or plats from the Surveyor-General's office, which are not in the record, were in evidence. In all such cases the presence of these maps, as introduced, is necessary to enable this court to give intelligent consideration to the testimony. This, too, is essential as to original diagrams used by expert witnesses. For instance, what purports to represent the original or a digram used by witness L'Engle in this case is to be found in appellants' brief. As illustrating his argument, counsel may draw what conclusion he pleases from it, but it cannot be considered as an illustration of the witnesses' views under oath where the witness himself has drawn his own diagram. In examining the eastern boundary of the Hogans Grant, and many other questions involved herein, we have been embarrassed for the want of them in this case.

Judgment reversed and new trial awarded.

JOHN J. KNOX, COMMISSIONER, &C., PLAINTIFF IN ERROR, VS. WILLIAM B. BARNETT, DEFENDANT IN ERROR.

1. Where, by consent, there is a trial by the court, a motion for a new trial upon the ground that the finding was contrary to the law and evidence overruled, and exception thereto, this court, upon a writ of error, is authorized and required by Chapter 521, Laws, and other statutes, to review such action overruling the motion for new trial and to examine the evidence.

2. Where a general agent having a power to sell a piece of land, limited only in the method of payment, and the agent having control of the rents of a building on the land, upon a sale of the land at public sale announces, in the presence of a tenant, that the purchaser, after a named date, shall be entitled to the rents, and the special agent, upon a payment for a part of the time to the purchaser, expresses approval of it, the principal is estopped from claiming rent paid to such purchaser by such tenant.

Writ of Error to the Circuit Court for Duval county.

The facts in the case are stated in the opinion.

Geo. Wheaton Deans for Plaintiff in Error.

Cockrell & Walker for Defendant in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In this case there was a trial by the court by consent, a finding for the defendant, a motion for new trial, motion overruled, exception thereto, and judgment for the defendant.

The grounds of the motion for a new trial were, that the finding of the court for the defendant was contrary to the evidence and to the law as applicable to the evidence.

The first question presented, while we think it is one easy of solution and determined with little difficulty, is of great importance as a matter of practice, and deserves, and has received at our hands, careful consideration. That question is whether, where by consent the trial is by the court, this court can upon motion for new trial, upon the grounds stated being overruled and exceptions thereto, review the action of the court in this respect upon a writ of error.

The Supreme Court of this State, like the Supreme Court of the United Statesc, and some, not all, ofthe State courts, anterior to the statute of 1853, Chap. 521, Laws, held that

cient to establish the fact of execution, should go to the jury.

As a matter of course, what is said as to proof of deeds in this case, does not refer to cases where the question of fraud is involved in the enquiry before the jury.

It is apparent from the bill of exceptions in this case, that certain maps or plats from the Surveyor-General's office, which are not in the record, were in evidence. In all such cases the presence of these maps, as introduced, is necessary to enable this court to give intelligent consideration to the testimony. This, too, is essential as to original diagrams used by expert witnesses. For instance, what purports to represent the original or a digram used by witness L'Engle in this case is to be found in appellants' brief. As illustrating his argument, counsel may draw what conclusion he pleases from it, but it cannot be considered as an illustration of the witnesses' views under oath where the witness himself has drawn his own diagram. In examining the eastern boundary of the Hogans Grant, and many other questions involved herein, we have been embarrassed for the want of them in this case.

Judgment reversed and new trial awarded.

JOHN J. KNOX, COMMISSIONER, &C., PLAINTIFF IN ERROR, VS. WILLIAM B. BARNETT, DEFENDANT IN ERROR.

1. Where, by consent, there is a trial by the court, a motion for a new trial upon the ground that the finding was contrary to the law and evidence overruled, and exception thereto, this court, upon a writ of error, is authorized and required by Chapter 521, Laws, and other statutes, to review such action overruling the motion for new trial and to examine the evidence.

2. Where a general agent having a power to sell a piece of land, limited only in the method of payment, and the agent having control of the rents of a building on the land, upon a sale of the land at public sale announces, in the presence of a tenant, that the purchaser, after a named date, shall be entitled to the rents, and the special agent, upon a payment for a part of the time to the purchaser, expresses approval of it, the principal is estopped from claiming rent paid to such purchaser by such tenant.

Writ of Error to the Circuit Court for Duval county.

The facts in the case are stated in the opinion.

Geo. Wheaton Deans for Plaintiff in Error.

Cockrell & Walker for Defendant in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In this case there was a trial by the court by consent, a finding for the defendant, a motion for new trial, motion overruled, exception thereto, and judgment for the defendant.

The grounds of the motion for a new trial were, that the finding of the court for the defendant was contrary to the evidence and to the law as applicable to the evidence.

The first question presented, while we think it is one easy of solution and determined with little difficulty, is of great importance as a matter of practice, and deserves, and has received at our hands, careful consideration. That question is whether, where by consent the trial is by the court, this court can upon motion for new trial, upon the grounds stated being overruled and exceptions thereto, review the action of the court in this respect upon a writ of error.

The Supreme Court of this State, like the Supreme Court of the United Statesc, and some, not all, ofthe State courts, anterior to the statute of 1853, Chap. 521, Laws, held that

cient to establish the fact of execution, should go to the jury.

As a matter of course, what is said as to proof of deeds in this case, does not refer to cases where the question of fraud is involved in the enquiry before the jury.

It is apparent from the bill of exceptions in this case, that certain maps or plats from the Surveyor-General's office, which are not in the record, were in evidence. In all such cases the presence of these maps, as introduced, is necessary to enable this court to give intelligent consideration to the testimony. This, too, is essential as to original diagrams used by expert witnesses. For instance, what purports to represent the original or a digram used by witness L'Engle in this case is to be found in appellants' brief. As illustrating his argument, counsel may draw what conclusion he pleases from it, but it cannot be considered as an illustration of the witnesses' views under oath where the witness himself has drawn his own diagram. In examining the eastern boundary of the Hogans Grant, and many other questions involved herein, we have been embarrassed for the want of them in this case.

Judgment reversed and new trial awarded.

JOHN J. KNOX, COMMISSIONER, &C., PLAINTIFF IN ERROR, VS. WILLIAM B. BARNETT, DEFENDANT IN ERROR.

1. Where, by consent, there is a trial by the court, a motion for a new trial upon the ground that the finding was contrary to the law and evidence overruled, and exception thereto, this court, upon a writ of error, is authorized and required by Chapter 521, Laws, and other statutes, to review such action overruling the motion for new trial and to examine the evidence.

2. Where a general agent having a power to sell a piece of land, limited only in the method of payment, and the agent having control of the rents of a building on the land, upon a sale of the land at public sale announces, in the presence of a tenant, that the purchaser, after a named date, shall be entitled to the rents, and the special agent, upon a payment for a part of the time to the purchaser, expresses approval of it, the principal is estopped from claiming rent paid to such purchaser by such tenant.

Writ of Error to the Circuit Court for Duval county.

The facts in the case are stated in the opinion.

Geo. Wheaton Deans for Plaintiff in Error.

Cockrell & Walker for Defendant in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In this case there was a trial by the court by consent, a finding for the defendant, a motion for new trial, motion overruled, exception thereto, and judgment for the defendant.

The grounds of the motion for a new trial were, that the finding of the court for the defendant was contrary to the evidence and to the law as applicable to the evidence.

The first question presented, while we think it is one easy of solution and determined with little difficulty, is of great importance as a matter of practice, and deserves, and has received at our hands, careful consideration. That question is whether, where by consent the trial is by the court, this court can upon motion for new trial, upon the grounds stated being overruled and exceptions thereto, review the action of the court in this respect upon a writ of error.

The Supreme Court of this State, like the Supreme Court of the United Statesc, and some, not all, ofthe State courts, anterior to the statute of 1853, Chap. 521, Laws, held that

cient to establish the fact of execution, should go to the jury.

As a matter of course, what is said as to proof of deeds in this case, does not refer to cases where the question of fraud is involved in the enquiry before the jury.

It is apparent from the bill of exceptions in this case, that certain maps or plats from the Surveyor-General's office, which are not in the record, were in evidence. In all such cases the presence of these maps, as introduced, is necessary to enable this court to give intelligent consideration to the testimony. This, too, is essential as to original diagrams used by expert witnesses. For instance, what purports to represent the original or a digram used by witness L'Engle in this case is to be found in appellants' brief. As illustrating his argument, counsel may draw what conclusion he pleases from it, but it cannot be considered as an illustration of the witnesses' views under oath where the witness himself has drawn his own diagram. In examining the eastern boundary of the Hogans Grant, and many other questions involved herein, we have been embarrassed for the want of them in this case.

Judgment reversed and new trial awarded.

JOHN J. KNOX, COMMISSIONER, &C., PLAINTIFF IN ERROR, VS. WILLIAM B. BARNETT, DEFENDANT IN ERROR.

1. Where, by consent, there is a trial by the court, a motion for a new trial upon the ground that the finding was contrary to the law and evidence overruled, and exception thereto, this court, upon a writ of error, is authorized and required by Chapter 521, Laws, and other statutes, to review such action overruling the motion for new trial and to examine the evidence.

2. Where a general agent having a power to sell a piece of land, limited only in the method of payment, and the agent having control of the rents of a building on the land, upon a sale of the land at public sale announces, in the presence of a tenant, that the purchaser, after a named date, shall be entitled to the rents, and the special agent, upon a payment for a part of the time to the purchaser, expresses approval of it, the principal is estopped from claiming rent paid to such purchaser by such tenant.

Writ of Error to the Circuit Court for Duval county.

The facts in the case are stated in the opinion.

Geo. Wheaton Deans for Plaintiff in Error.

Cockrell & Walker for Defendant in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In this case there was a trial by the court by consent, a finding for the defendant, a motion for new trial, motion overruled, exception thereto, and judgment for the defendant.

The grounds of the motion for a new trial were, that the finding of the court for the defendant was contrary to the evidence and to the law as applicable to the evidence.

The first question presented, while we think it is one easy of solution and determined with little difficulty, is of great importance as a matter of practice, and deserves, and has received at our hands, careful consideration. That question is whether, where by consent the trial is by the court, this court can upon motion for new trial, upon the grounds stated being overruled and exceptions thereto, review the action of the court in this respect upon a writ of error.

The Supreme Court of this State, like the Supreme Court of the United Statesc, and some, not all, ofthe State courts, anterior to the statute of 1853, Chap. 521, Laws, held that

the granting of a new trial upon a general review of the facts as shown by the evidence, as distinct from a special verdict of the jury, or case with findings of fact, or agreed statement of facts, embracing the conclusions of fact found as distinct from the evidence of the facts, was a matter of discretion in the court, which the Appellate Court would not review. See, however, on this subject, Gibson vs. Land, 27 Ala., 126. Whether properly or improperly it is not for us to say, but in 1853 the Legislature, to remedy this enactment the first section of an act entitled "An act judgments of the Circuit Courts of this State made and passed in any cause therein, wherein the said courts shall allow and grant, or shall refuse to allow and grant, any motion for new trial, or any motion to amend the pleadings, or to file new and additional pleadings, or to amend the record of any cause during the term in which it was determined, or shall refuse to allow and grant a motion for continuance of the cause, shall and may be assigned for matter and cause of error upon any writ of error sued out or appeal taken to the Supreme Court, and the said Supreme Court shall hear and determine the matter so assigned for error in the same manner and under the like rules and regulations as in other cases." At the date of this enactment the first section of an act entitled "An act to amend an act regulating judicial proceedings, approved November 23, 1828, approved November 21, 1828," provided, that when both parties in action at law agree to trial without a jury, the judgment shall be as effectual as upon verdict. These statutes are remedial in their character and should be liberally construed. The language is broad. "All orders of the Circuit Court" refusing "to allow and grant any motion for new trial shall and may be assigned for matter and cause of error."

This language embraces a trial by the court, as there is

no doubt that a motion for new trial is equally applicable to such trial by the court as to a trial by the jury. Indeed the Supreme Court of the United States when holding, in the absence of legislation authorizing it, that upon a writ of error the evidence before the court, in a trial by the court after motion for new trial, will not be reviewed, states that the remedy is a motion for new trial before the court of original jurisdiction. We have examined all the cases upon the subject in the Supreme Court of the United States. There is no act of Congress similar to our acts of the Legislature, and the cases are therefore precedents not applicable here.

We think there is no doubt of our power and duty to review the evidence before the Circuit Court upon exception to this order refusing a new trial, where the motion for the new trial was upon the ground that the finding was contrary to the evidence and to law.

The only other question in the case is whether the finding of the court was of such character, when examined in reference to the evidence, that the motion for new trial should have been granted. How was the finding in this respect? We think it was entirely conformable to the evidence.

This was an action of assumpsit by Knox against Barnett to recover a sum of money alleged to be due him, Knox, Comptroller of the Treasury of the United States, as Commissioner of the Freedman's Savings and Trust Company, for the use and occupation of banking rooms in the Freedman' Bank building, for the months of April, May and June, A. D. 1880, which has been paid to the purchaser.

The evidence shows that L. W. Spratt became the purchaser of the building in which these rooms were, at a sale had on the 25th of March, A. D. 1880; that W. H. Lock-

The counsel for the appellant contends that the evidence was not offered for such purpose, but simply to explain and limit the meaning of the words used. Robinson had already testified, without objection, that he had seen the note; that the endorsement was a forgery, and that he had so stated at the time, which was before he wrote the words "protest waived" above his endorsement. When he attempted to prove what the circumstances were, and for what purpose so he wrote these words, he is concluded by an objection. The appellant was entitled to show in evidence the facts and circumstances as they existed at the very time of the making of this contract as throwing ight upon the contract itself, and from these facts, so proven, the jury were to determine the question of his adoption of such signuture. The effect of the proof so offerd was not to vary a written instrument, but to assist in determining the question whether the instrument itself was binding upon the party, whether he had so adopted it that his liability was fixed. It would seem that this was particularly the province of the jury, and that the adoption of the endorsement by writing the words "protest waived" depends upon the circumstances which surrounded the act and the words spoken between the parties at the time.

"Parol evidence is admissible to explain and apply to writing, but not to add to it or vary its terms. This is a general doctrine which has been recognized almost universally., 2 Phil. Ev., Cowen & Hill's Notes, notes 494 and 495 and cases cited.

In Emory vs. Webster, 42 Maine, 204, the court say: "The rule of law is unquestioned that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, but the rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract. The writing may

be read by the light of surrounding circumstances in order more perfectly to understand the intent and meaning of the parties.

"The question being, what did the parties mean and understand by the written language used and to be interpreted? parol evidence of extraneous facts and circumttonces is often indispensable to aid in obtaining a true answer to the inquiry."

"Previous conversation between the parties may be shown when that becomes important to show in what sense subsequent writings passing between them were understood." Greenleaf Ev., 12 Ed., §§288 a. and 277.

"In all cases in which parol evidence has been admitted in exposition of that which is written, the principle of admission is that the court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted, the question being what did the person thus circumstanced mean by the language he had employed ?" Greenleaf Ev., 12 Ed., §295 a.

In the case of Com. Bank of Albany vs. Clark, 28 Vermont, 325, the facts were that defendant was sued as endorser upon a bill of exchange. The notice of its dishonor was proved by the written acknowledgment that he did receive due and legal notice of the protest and non-payment of the bill. The question in the case was whether this written acknowledgment was conclusive, or whether he could show that in fact no such notice of protest and non-payment was ever given, he having signed the admission under a misapprehension of the fact. The courts say that there was nothing in the case that renders the testimony inadmissible. "He was not estopped from making that defence by his promise."

In Keough vs. McMitt, 6 Minn., 513, the court hold

that: "Parol evidence is admissible in cases of written instruments, to prove collateral and independent facts, about which the writing is silent."

In Sigerson vs. Cushing, 14 Wis., 527, the court in its examination of this question concluded that in interpreting a contract the court must not look at it alone, but that "it is to be interpreted in the light of surrounding circumstancies," and say: "It is often absolutely essential that the court should know the facts surrounding the parties, and the situation in which they are placed, in order to interpret the meaning of what they say in their contracts."

In Lyon vs. Kidder, 48 Vermont, 42, the court hold that: "It is allowable oftentimes to show in evidence pre-existing and contemporaneous facts and circumstances attending the negotiation of parties in the making of their contracts, as such facts often throw light upon the disputed contract itself." See also upon this question; Starkie Ev., 5th Ed., 557; 2 Cush., 271; 77 N. Y., 304; 22 Barb., 326; 57 Ala., 440; 18 Lou. Ann., 148.

The testimony in this case was offered for the purpose of rebuting the presumption insisted upon by the plaintiff that Robinson, by writing the words "protest waived" over his name, had acknowledged or adopted the signature as his own. The object of the testimony was to rebut such presumption which might perhaps attach to the act.

The payee and endorser of the note, as it would seem from the evidence in the bill of exceptions, while protesting that the signature was not his, and that it was a forgery, consented to "waive protest" and notice by such endorsement above such signature. If, upon the trial of the cause, the signature should be shown to the satisfaction of the jury to be his true signature, then the necessity of proving that the bill was dishonored, protested and notice given was waived by this payee.

The question as to whether the appellee was the rightful owner or holder of the note is not involved in this question of the admission of evidence. We are of the opinion that the evidence should have been admitted for the purpose of rebutting the presumption of the adoption of the signature, as well as showing the facts and circumstances surrounding the case, not to contradict, alter, or vary the terms of the writing, but to get at the intention and meaning of the parties.

The other errors assigned relate exclusively to the charge of the court to the jury upon the facts as they existed when the cause had reached that point. It will not, therefore, be necessary to examine them, as the judgment must be reversed.

Judgment reversed and new trial awarded.

THOMAS MCMURRAY AND GEORGE M. BRITTAIN, APPELLANTS, VS. ARTHUR D. BASNETT, ET UX., APPELLEES.

1. A verdict will not be set aside as against the weight of evidence when such evidence is so contradictory as to make it the duty of the jury to decide upon the credibility of the witnesses, although such evidence seems to preponderate against their finding, unless there is ground for the belief that the jury acted through prejudice, passion, mistake or any other cause which should not properly control them.
2. In a motion for a new trial upon such ground where the court below has denied it, "it should be a very plain case to justify an Appellate Court in setting aside this concurrent conclusion of both court and jury."
3. In regard to excessive damages, the rule is, that in actions sounding in damages, when the law furnishes no legal rule of measurement save the discretion of the jury upon the evidence before them, courts will not disturb the verdict upon the ground of excessive

damages, unless it be so flagrantly improper as to evince passion, prejudice, partiality or corruption in the jury.

4. The affidavit of a juror is not admissible to impeach his verdict, on a motion for a new trial. He is not competent to show that the jurors, by agreement among themselves, severally marked on a paper such amount of damages as they saw fit, and that the quotient of the sum of these amounts divided by the number of jurors, was made their verdict.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

John Earle Hartridge for Appellants.

This was an action brought by Arthur D. Basnett and Mary H. Basnett, his wife, against Thomas McMurray and George M. Brittain, partners as McMurray & Brittain, to recover damages alleged to have been sustained at the hands of defendants, by virtue of the mare of the plaintiffs, which was kept for him at the livery stable of the defendants, being put to a stallion, and gotten with foal, without the consent of the plaintiffs, and sickness incident to the same.

To this the defendants pleaded, in addition to the general issue, that the consent of A. D. Basnett was first obtained, and no damage was sustained by the mare, and second, that the sickness of the mare was due to her heaving contracted the prevailing disease of epizootic.

The appellants were the defendants in the court below.

The argument of appellants in this case will be confined to—

First, the evidence; second, the charge of the court, and third, the method by which the jury reached their verdict.

Argument on the evidence:

First. Did not Thomas McMurray and George M. Brittain have the consent of A. D. Basnett?

Second. Are not the damages excessive?

In answering the first question, if the court will refer to the testimony of A. D. Basnett, they will find that A. D. Basnett, in his testimony, says that in reply to a declaration on the part of Thomas McMurray that he (Basnett) was going to allow him (McMurray) to put the mare to the stallion, that he (Basnett) replied in jest; that reply we find was in the following words: "All right!" So it is evident from Basnett's own testimony that he gave permission. Thomas McMurray, in his testimony, swears that Basnett gave him permission to put the mare to the stallion. George M. Brittain swears that he heard A. D. Basnett give Thomas McMurray permission to put the mare to the stallion. The testimony is *uncontradicted*. Thomas McMurray swears that he put the mare to the stallion on the same day that permission was given. The only way by which the appellees endeavor to escape from this testimony is by making a deduction from the period of gestation in animals of this kind, from the fallacious assumption that the mare in this case went her full time. In reply to this, Thomas McMurray says the colt came prematurely, and Solomon Harris, the appellees' own witness, says, in support of the premature birth of the colt, that it was weak and sickly, and he had to sleep with it and keep it covered with a blanket, and that in spite of these precautions it died. So that the whole testimony strongly supports the defendants' (appellants) position that *permission* was given, and the verdict is contrary to the weight of the evidence. As to the sickness of the mare with the epizootic, all of the witnesses confirm it. Even Basnett says her throat was swollen and had to be lanced.

Second.—Are not the damages excessive? Even if Thomas McMurray did not have permission to put the mare to the stallion, the damages given by the jury are excessive. Certainly only compensatory damages can be

allowed. Certain it is that more than compensation has been awarded.

The true measure of damages in this case would have been the difference between the market value of the mare that Basnett claims was damaged and the price that she afterwards actually sold for. Now, Basnett claims that he valued the mare at $200, though in another place he says he does not know what the market value was. George M. Brittain says her market value was $125 or $130. But suppose we take the most advantageous value for the appellees, viz: Mr. Basnett's *private* valuation of $200, and deduct from this the price that the mare afterwards sold for of $132.50, and we have the exact loss to Basnett, even if the defendants are guilty of acting without his permission. This would make the exact damage, giving Basnett the largest latitude, $67.50—the difference between $200 and the amount the mare sold for.

But the appellees say, Oh, this was a pet mare! Our feelings were outraged, (*as well as the mare.*) Well, I do not think in the first place that damages are allowable in a case like this for wounded feelings. But what are the facts? Were they wedded to this mare? Did they lavish their affections upon this animal? Did they hate to part with her? The evidence says no! The evidence discloses all the way that the appellees (Basnett and wife) were doing their level best to trade this mare. In the language of Basnett himself: "The mare was restless and I wanted to trade her. I was *disgusted* with her." Does this look like the mare was peculiarly valuable to Basnett and wife? Yet he wants this court to sustain a verdict against the appellees for a larger sum for this affectionate regard in which they held an animal with which they were disgusted. Again, Thomas McMurray and George Brittain both swear that Basnett was trying to trade this mare, and that Mary

H. Basnett, his wife, was trying other horses with a view to selling this mare. Dr. J. D. Fernandez declares in his testimony that Basnett was *disgusted* with the mare and wanted to trade her. On this subject there was not a dissenting voice, and yet the jury gave damages on the ground that his mare had a peculiar value to appellees because of their attachment to her. In the face of the testimony the verdict is *another outrage* far greater than that of which the appellees complain.

As a matter of fact was the mare damaged? If Thomas McMurray did put the stallion to the mare without permission, should the appellees have recovered anything but nominal damages? The mere putting a stallion to a mare works no injury. In this case, Basnett, in his testimony, says, (page 32,) that he did not see the mare after she dropped the colt. Then how does he know whether she sustained any damages at all?

J. W. Burton, (page 39,) testifies that he has been dealing in horses for thirty years,and that a mare is not injured by having a colt, and that she can be worked to within two weeks of the time of dropping her colt.

Again, this was not the first time this mare had been put to the stallion. Thomas McMurray testifies that the mare had been put to every stallion in the city before she was purchased by Basnett, and was not injured or damaged; and both McMurray and Brittain testify that in this instance the mare was as valuable after she had dropped her colt as before.

A. D. Basnett's own testimony shows that he got in a pet and would not see the mare again, and sold her for $132.50, which was more than the market value placed on the mare by either McMurray or George M. Brittain, and only $67.50 less than the *private special* value to Basnett and wife, as assessed by A. D. Basnett himself.

It does seem to me that the evidence in this case not only does not support the verdict, but entitled the appellants to a verdict. And because the verdict is such a flagrant violation of the evidence, and so *"utterly utter"* in its opposition to the weight of evidence, I ask the court, with a full knowledge of the rule adopted in regard to setting aside verdicts that are contrary to the evidence, to set this verdict aside and award a new trial. For if ever there was a time and a case when the verdict was not supported by the testimony, and should be relieved against, this is the time and this is the case.

Now as to the charge of the court. That a better understanding of the charges to which exceptions were taken may be had, I would briefly refer to the declaration and evidence.

The three first counts in the declaration are for a tort, and charge the defendants (appellants) with wrongfully, secretly and fraudulently committing a trespass to the plaintiffs' mare. The fourth count charges the defendants with a trespass to the mare and a breach of duty in taking care of the colt. The fifth count charges the defendants (appellants) with a neglect of duty in feeding and keeping the mare, and alleges that from *such* neglect she became out of condition and was injured. There was not one particle of evidence adduced in this trial to support the allegation of neglect of duty in feeding and keeping the mare, nor any evidence to support the allegation of breach of duty in taking care of the colt. On the contrary, the plaintiff, in his direct examination, testified that the defendants "kept up the rig handsomely;" and on cross-examination says: "During the time my man was sick, McMurray and Brittain gave her good care." The testimony of plaintiffs' (appellees) witness, Harris, shows that every possible care was taken of the colt, and that the sickness of the mare was

caused by her having the epizootic. There being, then, *obsolutely no evidence* before the jury tending to support the allegation of breach of duty, the court erred in giving the first charge asked by the plaintiffs (appellees), because said charge instructed the jury that the burden was upon Brittain to show that a trespass committed by his co-defendant was done under a license from the plaintiffs, and was calculated to lead the jury to think that George M. Brittain was liable for any trespass or tort committed by his *co-partner,* which is contrary to the law. "A tort is in its nature the separate act of each individual." For the same reason the court erred in refusing to give the first charge asked by defendants (appellants). The only class of torts committed by one partner which will fix the liability upon his co-partner or the firm, are such as arise out of contract, and consist of misfeasance or non-feasance in the performance of the contract. 1 Chitty on Pleadings, marginal pages 87 and 88.

When one partner commits a trespass beyond the scope and business of the partnership, the other partners are not liable unless they sanction the transaction. Petrie vs. Lamount 1 Car. and M., 93; Taylor vs. Jones, 42 N. H. 25; Wait's Actions and Defences, Vol. 6, page 57.

Certainly this putting the stallion to this mare was beyond the scope of the partnership, and George M. Brittain should not be liable. As there is no evidence tending to show that George M. Brittain ever sanctioned this act of McMurray, it follows that the court erred as above stated, and the verdict of the jury was contrary to the law and the evidence.

The fourth charge as by the plaintiff's (appellees), and given by the court, charges the jury as to the weight of the testimony, which is prohibited by the statute, and the jurors are the sole judges of the weight and credibility of the evidence.

The amount of the verdict in this case, in view of the exceedingly (if any) small damage sustained by the appellees, is conclusive that the jury must have been misled by the charge of the court.

Any verdict arrived at by chance will be set aside.

This is an undisputed proposition of law. The only trouble is the manner in which the attention of the court shall be called to this irregularity. I am aware that as a rule the affidavit of a juror will not be heard to impeach his own verdict, but it is this affidavit, which only states the method by which the verdict was reached, such as an impeachment as to preclude the same? How else can the error be pointed out except in the affidavit of a member of the jury?

In view of these points above made, I respectfully submit that a new trial should be awarded.

Cockrell & Walker for Appellees.

MR. JUSTICE VANVALKENBURG delivered the opinion of the court.

In April, 1881, Arthur D. Basnett and wife brought suit against the appellants, McMurray and Brittain, proprietors and keepers of a livery, feed and sale stable in the City of Jacksonville to recover damages alleged to have been sustained by them by reason of improper manner of their taking charge of a certain mare left in their care for keeping.

The declaration alleges that the plaintiff, Mary H. Basnett, was the owner of a certain mare of great value, which was a gift to her from her husband, Arthur D.; that such mare was purchased by the husband from McMurray & Brittain for a family horse, and for the especial use of his said wife to drive in harness, and was highly prized by the plaintiffs, and particularly so by the said Mary H., for her

gentleness and other good and serviceable qualities, as well as on account as having been a gift from her husband, all of which was well known to the defendants; that defendants were proprietors and keepers of a livery, feed and sale stable, and as such took and received into their stable the mare, to be kept and cared for, for a reward to be paid to them by the plaintiffs; that while the mare was so in their custody and keeping the defendants wrongfully caused her to be covered by a stallion and to be got with foal, by reason whereof the mare was rendered unfit for the use for which she was purchased, and her services wholly lost to plaintiffs for four months, and the market value of the mare was depreciated in the sum of two hundred dollars, and that plaintiffs have been greatly outraged in their feelings and otherwise damaged. The declaration contains five counts.

To this the defendants plead, first, not guilty; second, that the mare was put to the stallion with the consent of the plaintiff, Arthur D. Basnett, and that she was not thereby damaged or depreciated in value; third, that plaintiffs were not deprived of her use by reason of her having been put to the stallion, but by reason of her having contracted the epizootic. These pleas are sworn to by both of the defendants.

The issue was tried before a jury in May, 1881, and they found for the plaintiffs, and assessed their damages at two hundred and fifteen dollars.

Counsel for the defendants then moved for a new trial upon the grounds—

1st. The verdict is contrary to the weight of evidence.

2d. The verdict is contrary to law.

3d. The damages are excessive.

4th. The jury arrived at their verdict by chance.

In support of the fourth ground of the motion for a new

trial the counsel introduced an affidavit of Luther McConihe, one of the jurors who heard the trial of said cause, in which he swears "that after the jury retired to consider the case that there was a difference of opinion among them as to the amount for which a verdict should be returned; that to obviate this difficulty they, the jurors, by agreement among themselves, were severally to mark on a paper such amount as they respectively saw fit, and the quotient of the sum of these amounts, divided by the number of jurors, was to be their verdict; that this agreement was actually carried out, and that the verdict rendered by them was reached in this way."

The court, upon argument of the motion, ordered that the affidavit of McConihe be ruled out as inadmissible, and denied the motion for new trial; whereupon the counsel for defendants expected to such rulings.

Judgment was then entered upon such verdict.

The errors assigned are as follows:

First. The court erred in overruling the appellants' motion for a new trial:

1. Because the verdict was contrary to the evidence and the law.

2. Because the damages are excessive and not warranted by the evidence.

Second. In giving the first charge asked by the plaintiffs in the court below.

Third. The court erred in refusing to give the first charge asked by the defendants.

Fourth. The court erred in giving the fourth charge asked by the defendants.

Fifth. In refusing to set aside the verdict on the ground that it was arrived at by chance.

The first error assigned is, that the court erred in overruling appellants' motion for a new trial for the reason—

first, that the verdict was contrary to the evidence and the law, and second, because the damages are excessive and not warranted by the evidence.

The evidence in this case is conflicting. Arthur D. Basnett, one of the plaintiffs, testified that the defendants, McMurray & Brittain, were co-partners in keeping a stable; that he purchased the mare from them as a wedding gift to his wife; that he also bought a phaeton to go with the mare as a gift; that when he purchased the mare it was understood that she was to be kept at the defendants' stable, and that he paid them twenty dollars per month to take care of the mare and phaeton; that the turnout was subject to his wife's order every day, and that he never drove the mare without her permission; that he never gave either of the defendants permission to put the mare to the stallion; that McMurray frequently asked permission to put her to the stallion, and that he refused to give such permission; that on one occasion, between 19th of June and 3d of July, the question of the mare being a fine mare was raised; that McMurray said, "yes, that he was going to allow him to put a fine stallion to the mare and give him the colt;" that he made some reply in jest; that next morning he went back to the stable to tell them that it must not be done, and McMurray said it had not been done; that shortly afterwrds his suspicions were aroused, and he asked McMurray and Brittain if the mare had been put to the stallion, and they both denied it. In November the mare was taken sick and remained ill during November and December; that it was not until about the 20th of January, 1881, he was fully convinced that the mare was with foal; that his wife was in the habit of driving the mare regularly, and was very fond of driving; that she was made a great pet of by his wife; that his wife would drive on the road and get out and walk to gather flowers, and the mare would follow her;

that he valued the mare at two hundred dollars, and that the damages to plaintiffs was three hundred dollars; that he had tried to make a trade with the defendants of this mare for one of their horses, but after trying some of them he told McMurray that their mare (Lady) suited them very well; that subsequently McMurray told him the mare was with foal; that he then sent her to McGinniss' stable and had her sold. The foal was dropped early in March.

Solomon Harris, a witness on the part of the plaintiffs, testified that he worked for the defendants, curried and watered the mare, and that when she was sick she had the epizootic; that when the colt was dropped it was weak and small. The mare would not let it suck; that it took two to hold the mare and help the colt nurse; that he slept with the colt and kept it covered with blanket to try and keep it alive, but it died.

On the part of the defendants, Thomas McMurray testified that from the time the colt was dropped he judged she was foaled between 8th day of April and August; that Basnett frequently tried to trade the mare to defendants and to others; that Basnett and his wife drove different horses of defendants with a view of trading, but did not, because defendants asked too much for their horses; that the mare was vicious and ugly, and Mrs. B. frequently became disgusted with her, and said when driving her she would not give a cent for her life. The mare was put to the stallion with Mr. B.'s permission; that he put her the same day the permission was given. It was same conversation testified to by Mr. B.; that he never denied to Mr. B. putting the mare to the stallion; that he always said he did not know whether she was with foal; that defendants now own the mare, bought her from Mr. McGinniss for one hundred and thirty-two dollars and fifty cents; that she is as valuable as she ever was; that when she was

sick she had the epizootic. Her going to the stallion had nothing to do with her sickness; that they had her throat lanced; that at the time the stallion was put to her her market value was not over one hundred and thirty-two dollars and fifty cents; that he thought the colt came prematurely, because it was weak and poor, and had but little life. The mare was vicious, would not let the colt suck; except with great trouble and when she was held by two men.

George M. Brittain, one of the defendants, testified that he heard McMurray ask Basnett if he was willing to let him put the mare to the stallion and he (McMurray) have the colt; that Basnett consented; that this was in the conversation testified to by both Basnett and McMurray; that both plaintiffs were dissatisfied with the mare and wanted to trade her. The market value of the mare was $125 or $130. She is still a little affected with the epizootic.

J. W. Burton testified that a mare is not injured by having a colt; that a mare with foal can be used without injury, she can be driven up to two weeks of the time that she drops her colt; that when with foal more care has to be exercised with them.

J. D. Fernandez testified that Mr. Basnett was disgusted with the mare, and wanted to trade her; that a mare goes eleven months before dropping her colt.

Upon this evidence the jury found their verdict for the plaintiffs, and assessed their damages. We cannot doubt the right of the appellees to recover if the proof makes out the case set up in their declaration.

The question of the loss and injury was particularly within the province of the jury, and they were empaneled to determine it. This court has frequently said that it will not set aside a verdict as against the weight of evidence, where such evidence is so contradictory as to make it the duty of the jury to decide upon the credibility of the

that he valued the mare at two hundred dollars, and that the damages to plaintiffs was three hundred dollars; that he had tried to make a trade with the defendants of this mare for one of their horses, but after trying some of them he told McMurray that their mare (Lady) suited them very well; that subsequently McMurray told him the mare was with foal; that he then sent her to McGinniss' stable and had her sold. The foal was dropped early in March.

Solomon Harris, a witness on the part of the plaintiffs, testified that he worked for the defendants, curried and watered the mare, and that when she was sick she had the epizootic; that when the colt was dropped it was weak and small. The mare would not let it suck; that it took two to hold the mare and help the colt nurse; that he slept with the colt and kept it covered with blanket to try and keep it alive, but it died.

On the part of the defendants, Thomas McMurray testified that from the time the colt was dropped he judged she was foaled between 8th day of April and August; that Basnett frequently tried to trade the mare to defendants and to others; that Basnett and his wife drove different horses of defendants with a view of trading, but did not, because defendants asked too much for their horses; that the mare was vicious and ugly, and Mrs. B. frequently became disgusted with her, and said when driving her she would not give a cent for her life. The mare was put to the stallion with Mr. B.'s permission; that he put her the same day the permission was given. It was same conversation testified to by Mr. B.; that he never denied to Mr. B. putting the mare to the stallion; that he always said he did not know whether she was with foal; that defendants now own the mare, bought her from Mr. McGinniss for one hundred and thirty-two dollars and fifty cents; that she is as valuable as she ever was; that when she was

sick she had the epizootic. Her going to the stallion had nothing to do with her sickness; that they had her throat lanced; that at the time the stallion was put to her her market value was not over one hundred and thirty-two dollars and fifty cents; that he thought the colt came prematurely, because it was weak and poor, and had but little life. The mare was vicious, would not let the colt suck; except with great trouble and when she was held by two men.

George M. Brittain, one of the defendants, testified that he heard McMurray ask Basnett if he was willing to let him put the mare to the stallion and he (McMurray) have the colt; that Basnett consented; that this was in the conversation testified to by both Basnett and McMurray; that both plaintiffs were dissatisfied with the mare and wanted to trade her. The market value of the mare was $125 or $130. She is still a little affected with the epizootic.

J. W. Burton testified that a mare is not injured by having a colt; that a mare with foal can be used without injury, she can be driven up to two weeks of the time that she drops her colt; that when with foal more care has to be exercised with them.

J. D. Fernandez testified that Mr. Basnett was disgusted with the mare, and wanted to trade her; that a mare goes eleven months before dropping her colt.

Upon this evidence the jury found their verdict for the plaintiffs, and assessed their damages. We cannot doubt the right of the appellees to recover if the proof makes out the case set up in their declaration.

The question of the loss and injury was particularly within the province of the jury, and they were empaneled to determine it. This court has frequently said that it will not set aside a verdict as against the weight of evidence, where such evidence is so contradictory as to make it the duty of the jury to decide upon the credibility of the

witnesses, although such evidence seems to preponderate against the finding of the jury, unless there is "ground for the belief that the jury acted through prejudice, passion, mistake, or any other cause which should not properly control them." In this case, the evidence was conflicting; it was the duty of the jury to weigh it, to harmonize it if possible, to judge of the credibility of the witnesses as they appeared upon the stand and gave their evidence, and from all the circumstances which surrounded the case to consider and determine upon their verdict. The court also, in the exercise and discharge of its duties, had the same opportunity of observing the witnesses and judging of the truth as was given to the jury; and in denying the motion for a new trial, has concurred with the jury in the verdict which they rendered.

This court says, in the case of Schultz vs. Pacific Ins. Co., 14 Fla., 73: "It should be a very plain case to justify an appellate court in setting aside this concurrent conclusion of both court and jury, upon the ground that their action was contrary to the evidence or weight of evidence." We have here not only the finding of the jury upon the facts as they were presented to them, but also the judgment of the court that the verdict so rendered was just and proper. (Tall. R. R. Co., 8 Fla., 299; Pen. & Ga. R. R. Co. vs. Nash, 12 Fla., 497; Wilson vs. Dibble, 14 Fla., 47; Nichols & Gautier vs. Mooring, 16 Fla., 76; Coker vs. Merritt, 16 Fla., 416; Sherman vs. The State, 17 Fla., 888.) This court has decided this point so often that it has become a little monotonous.

The appellants, however, claim that the damages are excessive, and therefore the court should have granted a new trial. The same reasons apply why this court should not interfere upon that ground as upon the ground that the verdict is against the weight of evidence. The only proof

directly upon the subject of damages, and in which the amount is named, is that of Basnett, who testifies that they were three hundred dollars. From the other proof the jury would have been justified in rendering a smaller verdict if they had seen fit to do so; and we cannot say, but that from the evidence as it appears to us upon the record, we should have been better satisfied with a verdict for a less amount of damages. As is well said in Tallahassee R. R. Co. vs. Macon, 8 Fla., 299, it is not for this court, "after verdict, to measure precisely the degree of weight which each particular statement of fact must perforce have on the mind of a jury, and, striking a balance between the two, to set aside the verdict or render judgment as the balance may fall on one side or the other. To carry the rule for granting new trials thus far would be to invade the province of the jury." In the case of the Indianapolis Sun Co. vs. Horrell, 53 Ind., 527, the court says "the judgment of the jury, not the court, is to determine the just measure of damages; but it must be their judgment, unbiased by prejudice, uninfluenced by corruption or undue means." In Crose vs. Rutledge, 81 Ill., 266, which was an action for the seduction of plaintiff's wife, where the proof showed that the plaintiff was of low character, the court say, "As to the damages, we think, considering the character of the plaintiff as developed in the testimony, he was not in a position to demand and receive from a jury so large an amount, but we cannot say it is so excessive as to inspire a belief it was the result of passion or prejudice or partiality."

In Solen vs. V. and T. R. R. Co., 13 Nev., 106, upon this question of excessive damages the court, in their opininon, say: "There being no absolute fixed legal rule of compensation, appellate courts ought not interfere with the verdict unless it clearly appears that there has been such a mistake

of the principles upon which the damages were estimated, or some improper motive or bias indicating passion or prejudice upon the part of the jury. The amount of the verdict was excessive. While the general term has a right to is not, in our opinion, inconsistent with the exercise of an honest judgment upon the part of the jury, whose special province it was to determine this question."

In the case of Kiff vs. Youmans, 20 Hun. N.Y.,S. C., 123, the court say: "Again, the defendant insists that the verdist was excessive. While the general term has a right to review the motion for a new trial upon this ground, it must be admitted that the judge who tried the case is better qualified to form a correct opinion. All witnesses look alike on paper. The question of as to who should be believed, in case of conflicting evidence, is better decided by the jury and by the judge who presided at the trial. * * As long as the system of jury trials is maintained, the courts should only interfere in cases where the verdict shows prejudice or passion or the like."

In Worster vs. The Proprietor of the Canal Bridge, in 16 Pickering, 541, the court use this language: "We are of the opinion that the damages assessed are not so excessive and unreasonable as to warrant the interference of the court in a matter which is peculiarly within the province of the jury. In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. * * * We do not consider whether or not we should have assessed the same amount of damages if the case had been submitted to the court to decide, for in a case like

the present men of sound judgment may differ not a little in estimating the compensation which the circumstances of the injury would justify; and it is the judgment of the jury, and not that of the court, which must govern. To justify the interposition of the court the damages must be manifestly exhorbitant."

In the case of Miss. C. R. R. Co. vs. Carruth, 51 Miss., 77, the court, in its opinion, lays down the following rules: "It was urged on the motion for a new trial that the damages found by the jury were excessive. The rule on this subject is, that in actions sounding in damages, where the law furnishes no legal rule of measurement save the discretion of the jury upon the evidence before them, courts will not disturb the verdict upon the ground of excessive damages, unless it be so flagrantly improper as to evince passion, prejudice, partiality or corruption in the jury, upon mere matter of damages, where different minds might and probably would arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, the verdict should be left as the jury found it." See also 25 Cal., 461; 23 Wis., 195.

The second error assigned is that the court erred in giving the instructions first asked by the appellees, which is in the following language: "If the jury are satisfied from the evidence in this case that the mare, the subject-matter in this suit, was put to a stallion by defendant, McMurray, then the burden is upon each defendant to show to the satisfaction of the jury that such putting was done by the consent of the plaintiffs."

The mare was purchased by Basnett of the appellants as a gift to his wife, who was found of driving, and did so regularly. She was made a great pet of by her owner.

The appellants kept a livery and sale stable, and, at the time of the purchase of the mare of them, it was the un-

derstanding between them and Basnett that they were to keep and care for her, for which care and attention Basnett was to, and did, pay them a stipulated sum per month. The object of the purchase was to furnish Mrs. B. the means of driving daily if she desired.

These facts the appellants well understood, and they were bound to take such care of the mare as would keep her in condition to be used by her owner in the manner desired. The appellees claim that the appellants have not kept her in such condition, but that, by their wrongful act, they have rendered her unfit for the service for which she was purchased. They bring this action to recover their damages for thus failing to take such care of her as they promised and agreed when Basnett purchased the mare of them. In the light of these facts we cannot see how there was error in this charge of the Judge.

The act of one of the appellants is the act of both, and the consent, if given by Basnett to one, would justify them in what they did. The language of the Judge in his ruling is that "the burden is upon each defendant to show," &c. This may be a clerical error in the record, but it can make no material difference, as it could not have misled the jury. Had it been "such defendants," or "the defendants," the result must have been the same, as we think the act of one of these parties in this case bound the other. It was a wrongful breach of the contract made between the parties at the time of the purchase of the mare. Story on Part., §166; Linton vs. Hunley, 14 Gray, 191; Craker vs. Chicago and N. W. R. R. Co., 36 Wis., 657; Loomis vs. Barker, 69 Ill., 360; DuVant vs. Rogers, 87 Ill., 508; Chitty's Pleadings, 92.

The third error assigned by the appellants is sufficiently answered by what we have said in reference to the second assigned error. If the partners were liable to the appellees

for the wrongful act done, then the court did not err in refusing to charge as requested by the appellants.

The fourth error assigned is to a portion of the charge of the court in which we can see no error. The court charges in effect that, in considering the proof in regard to the consent said to have been given by Basnett, that direct and circumstantial evidence is entitled to greater weight than that which is uncertain and indefinite; and, further, that in determining the question of consent the jury must look to the period when the colt was dropped, and regard the period of gestation as circumstances tending to show when the horse was put to the mare. The whole charge seems to have presented the case fairly to the jury, and had no tendency to mislead them in forming their opinion.

The fifth and last error assigned is in refusing to set aside the verdict upon the ground that it was arrived at by chance. To support the motion for a new trial upon this ground the appellants introduced and relied upon an affidavit made by one of the jurors who tried the cause. This affidavit the court very properly ruled out for the reason that a juror could not be heard upon what transpired within the jury room, especially to prove any irregularities upon the part of such jury. In the case of Godwin vs. Bryan, 16 Fla., 396, this court has said that "the prevailing rule of law is that the affidavits of jurors, as to their conduct and deliberations in the jury room, are not received for the purpose of impeaching their verdict." In Coker & Scheiffer vs. Hays, 16 Fla., 368, this court also say: "'The oath of a juror is not admissible to impeach his verdict." This is the rule as adopted in this State, and which also prevails in many other States, therefore there was no error in refusing to consider the affidavit of the juror as to their "conduct and deliberations in the jury room." The affidavit of a juror is not admissible to impeach his verdict on

curred, while disposed to consider favorably the present application upon the circumstances stated that if the case were otherwise free from the apparant laches of the plaintiff in error, we think that justice requires that this motion to reinstate be denied.

MATILDA WADE, ET AL., APPELLANTS, VS. MICHAEL J. DOYLE, APPELLEE.

1. Under the law of this State permitting a party to plead and demur to the same pleading at the same time, it is proper to allow a demurrer to be filed on a day subsequent to the filing of a plea in bar, it being the intent of the law to allow issues of law and of fact to exist at the same time.
2. Lands are described in a declaration in ejectment thus: "Lots one and two *of* range thirty-one, east, township nineteen, south, and fractional section thirty," and on demurrer that the description was so vague that the lots could not be identified; it is held that the language imports that lots one and two are *parts of* the range, township and section named, and the description is sufficiently intelligible and definite.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion.

E. K. Foster and *Hopkins & Walker* for Appellants.

Fleming & Daniel for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This was an action of ejectment commenced in September, 1878, at which time a declaration was filed, and after plea filed thereto an amended declaration was filed, to which defendant on July 24, 1879, filed a plea of not guilty, and plaintiffs filed their replication thereto. After

sundry proceedings an irregular verdict and judgment were rendered against plaintiffs, which upon appeal were reversed in this court and the cause remanded for further proceedings in May, 1880. In August, 1881, defendant asked and obtained leave to file a demurrer to the declaration, the plaintiff objecting thereto.

The declaration was in the common form, and described the premises sued for as a parcel of land lying in Orange county known and described as follows: "Lots one and to of range thirty-one, east, township nineteen, south, and fractional section thirty."

The grounds of the demurrer were that the declaration was uncertain, and the description of the premises is so vague that the land cannot be located, and that the sheriff could not deliver possession in case of judgment for plaintiffs.

The plaintiffs objected to the filing of the demurrer, but the objection was overruled, and they then joined in demurrer, and the same having been brought to a hearing the demurrer was sustained and the declaration adjudged to be not sufficient in law, with leave to the plaintiffs to amend, which they declined to do, thereupon judgment was given by the court against the plaintiffs, and they appealed.

The errors assigned are that the court allowed the demurrer to be filed, the plea of not guilty remaining of record; and that the court sustained the demurrer and gave judgment thereon against the plaintiffs.

The statute allows parties to plead and demur to the same pleading at the same time upon an affidavit by the party, if required by the Judge, to the effect that he is advised and believes that he has just ground to traverse the pleading, and that the several matters sought to be pleaded by way of confession and avoidance are true; and that he is further advised that the objections raised by demurrer

curred, while disposed to consider favorably the present application upon the circumstances stated that if the case were otherwise free from the apparant laches of the plaintiff in error, we think that justice requires that this motion to reinstate be denied.

MATILDA WADE, ET AL., APPELLANTS, VS. MICHAEL J. DOYLE, APPELLEE.

1. Under the law of this State permitting a party to plead and demur to the same pleading at the same time, it is proper to allow a demurrer to be filed on a day subsequent to the filing of a plea in bar, it being the intent of the law to allow issues of law and of fact to exist at the same time.
2. Lands are described in a declaration in ejectment thus: "Lots one and two *of* range thirty-one, east, township nineteen, south, and fractional section thirty," and on demurrer that the description was so vague that the lots could not be identified; it is held that the language imports that lots one and two are *parts of* the range, township and section named, and the description is sufficiently intelligible and definite.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion.

E. K. Foster and *Hopkins & Walker* for Appellants.

Fleming & Daniel for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This was an action of ejectment commenced in September, 1878, at which time a declaration was filed, and after plea filed thereto an amended declaration was filed, to which defendant on July 24, 1879, filed a plea of not guilty, and plaintiffs filed their replication thereto. After

sundry proceedings an irregular verdict and judgment were rendered against plaintiffs, which upon appeal were reversed in this court and the cause remanded for further proceedings in May, 1880. In August, 1881, defendant asked and obtained leave to file a demurrer to the declaration, the plaintiff objecting thereto.

The declaration was in the common form, and described the premises sued for as a parcel of land lying in Orange county known and described as follows: "Lots one and 10 of range thirty-one, east, township nineteen, south, and fractional section thirty."

The grounds of the demurrer were that the declaration was uncertain, and the description of the premises is so vague that the land cannot be located, and that the sheriff could not deliver possession in case of judgment for plaintiffs.

The plaintiffs objected to the filing of the demurrer, but the objection was overruled, and they then joined in demurrer, and the same having been brought to a hearing the demurrer was sustained and the declaration adjudged to be not sufficient in law, with leave to the plaintiffs to amend, which they declined to do, thereupon judgment was given by the court against the plaintiffs, and they appealed.

The errors assigned are that the court allowed the demurrer to be filed, the plea of not guilty remaining of record; and that the court sustained the demurrer and gave judgment thereon against the plaintiffs.

The statute allows parties to plead and demur to the same pleading at the same time upon an affidavit by the party, if required by the Judge, to the effect that he is advised and believes that he has just ground to traverse the pleading, and that the several matters sought to be pleaded by way of confession and avoidance are true; and that he is further advised that the objections raised by demurrer

are good and valid objections in law, and it shall be in the discretion of the court to direct which issue shall be first disposed of. Sec. 34, Ch. 1093, Act of Feb. 8, 1861.

The question first raised is whether a party may both plead and demur to the same pleading unless the pleading and demurrer shall be offered and filed *at the same time*. The former rule was that a demurrer could not be filed after pleading, except upon withdrawing the former pleading by the party seeking to demur. The statute, however, allows both plea and demurrer. In view of the obvious intent of the statute to change the old rule, it can scarcely be of consequence that the pleading and the demurrer be filed on the same or on different days. The Judge may require the affidavit of merits and of good faith to be made and filed on the offering of the demurrer after the pleading is filed, as well as when both are offered at the same moment. It is in his discretion to require such affidavit or not to require it, and also to determine whether the issue of law or the issue of fact shall be first disposed of. The meaning of the statute undoubtedly was to authorize an issue of law and an issue of fact to stand at the same time, to be disposed of in such order as would promote the ends of justice; and we cannot conceive it to be material that the pleading and demurrer shall be on one piece of paper, or two pieces, or that one of them was handed to the clerk before the other. If it was material that both should be filed at the same time, it would only be necessary for the pleader to withdraw the pleading and file it again with his demurrer.

The ruling of the court upon the demurrer to the declaration presents the only material question. The description of the property is alleged to be so vague that it cannot be located and identified. The only question here is one of the construction of the words used in the attempted de-

scription. It is the duty of courts to give effect to words employed according to their obvious meaning and intent. The words here used are "lots one and two, of range thirty one, east, township nineteen south, and fractional section thirty."

According to the construction contended for by the demurrant the words mean nothing at all, and describe nothing that can be identified; that "lots one and two, of R. 31 E., T. 19 S.," is vague because it does not show in what section or part of the township the land is located; and that "and section thirty" refers to another parcel of land, but does not locate it in any township and range. We think, however, that the word "of" plainly means *portion* or *part of* the township, &c., and that in this sense it is obviously used here. There is also a rule of the grammatical construction of the language, to-wit: that when we desire to name several things, as a horse, a tree and a house, we mean a horse *and* a tree *and* a house. Now, by the application of this simple law of language, we read the description of the lands thus: "Lots one and two, parts of range thirty-one, east *and* township nineteen south, *and* fractional section thirty." Reading it thus, if the same words were used in a contract, we could not avoid the conclusion that the lots one and two were parts of range thirty-one east, township nineteen south, and of section thirty in that township. While the language of the declaration in describing the land is rather awkward, yet it is sufficiently intelligible, and we think that if the defendant held a conveyance from the plaintiffs which used the same words of description, he would hold lots one and two, of section thirty, in spite of them. And while we cannot commend the economy of the plaintiffs in declining the suggestion of the court that they should relieve their pleading of its awkwardness by a very simple amendment, yet as they have preferred to submit a

question of syntax to this court, we have found it our duty to decide it according to the grammar and the dictionary, as we understand those highly valued authorities.

The judgment is reversed, and the cause remanded with directions to render judgment overruling the demurrer, and for such further proceedings as may be had according to the law and practice.

N. B. COOK, PLAINTIFF IN ERROR, VS. YANCEY S. COOK, DEFENDANT IN ERROR.

1. An order that a cause stand dismissed at plaintiff's cost, there having been no service of process upon the defendant, is a final disposition of the matter to which a writ of error lies.
2. Under rule thirteen (13) of the Rules and Practice of the Circuit Courts a declaration is required to be filed on the rule day upon which the defendant is required to appear by a summons duly served and returned. Until service and return of process no declaration is required to be filed.

Writ of Error to Circuit Court for Escambia county.

The order of dismissal, after stating the court and the title of the case, is as follows:

The plaintiff having failed to file a declaration herein on the next succeeding rule day to which suit was brought, as required to do by rule 13, the case, therefore, stands dismissed at the said plaintiff's cost.

F. E. DE LA RUA,
Clerk Circuit Court.

June 6, 1881.

The other facts of the case are stated in the opinion.

S. A. Perry for Plaintiff in Error.

J. E. Yonge for Defendant in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This case involves the question as to what constitutes a final judgment and the construction of Rule 13 of the Rules of Practice in the Circuit Courts of this State in common law actions. This rule provides that "all declarations shall be filed on or before the rule day to which the process is made returnable. If not thus filed no default for want of appearance shall be entered. If the declaration is not filed on the next succeeding rule day thereafter the case shall stand dismissed at the cost of plaintiff, and the clerk shall enter an order accordingly. If it is filed upon or before that day the defendant shall be held to enter his appearance upon that day, and the cause shall proceed in all respects as if that had been the original day for the return of the process."

In this case the praecipe was filed on March 2, 1881, and on the same day a summons *ad respondendum* was issued returnable to the 4th day of April, that being the next rule day thereafter having ten days intervening between it and the date of the issuing of the summons. On the 12th of March the writ was returned unexecuted, the sheriff stating in his return that "Y. S. Cook resides out of the State," and on the 28th of March an alias sumons was issued returnable to the rule day in May. This, because of loss or otherwise, does not appear among the papers at the clerk's office. On the June rule day, no declaration having been filed, the clerk entered an order that the case stand dismissed at plaintiff's cost. The plaintiff at a subsquent term of the court moved the court to set aside this order. This motion was denied, and a writ of error is now prosecuted to review the action of the clerk and the order in term.

It is insisted first that this is no final judgment. If this is correct then this appeal must be dismissed, as a writ

of error in a common law action does not lie to any other than final judgment. It is true that the order of dismissal here is not drawn up technically in strict conformity to the form of common law entry of dismissal, but such technical accuracy is not required. It is necessary that the action taken finally disposes of the case, and looking to the statute (Chap. 1938, Laws,) and the rule made thereunder, the order here is a final disposition. The authorities abundantly sustain this proposition. (See Freeman on Judgments, §17, and cases cited 3 Otto, 113.) It was not necessary here that the entry should state that the defendant go hence, &c., or that it should be for any costs expended in this behalf by him, because he had not been served with summons, and could not have expended any moneys for costs. We think the difference between this case and the case cited in support of the view that this is not a final judgment is plain.

In the case of Myerson vs. Home Insurance Company, 15 Fla., 574, the appeal did not reach the order of the clerk dismissing the cause. Here the writ of error does. In Coons vs. Harllee, 17 Fla., 484, there was no judgment for plaintiff or defendant. In McKinnon vs. McKollum, 6 Fla., 376, there was a bill of exceptions, but nothing purporting to be a final judgment. In the case of St. Augustine vs. Usina, there was a judgment upon the demurrer with leave to plead over.

This court having jurisdiction of this writ of error, the only question remaining is, whether under the rule the plaintiff failing to file his declaration on the next succeeding rule day to that at which the summons was made returnable, the clerk, in a case where there was no service of the writ, should have entered an order of dismissal. In other words, is the requirement in the first clause of the rule that "all declarations shall be filed on or before

the rule day to which the process is made returnable," to be given operation acording to its literal signification, and does it mean that such declaration shall be filed in a case where there is no service of process and no defendant to declare against?

This clause must be construed with reference to the succeeding parts of the rule, to the statute under which the rule was made, to other rules having a bearing upon the subject, and the common law principles of practice in this behalf.

The next clause in this rule declares the immediate consequence of a failure to file the declaration on the rule day to which the process is made returnable to be that *no default for want of appearance* shall be entered, and as no default for want of appearance can be entered, except where there has been service of process, it is clear beyond question, construing the two clauses together, that the rule day contemplated for the filing of the declaration is a rule day upon which such a default may be entered, and that is a rule day to which a writ is duly served and returned. If the first clause of the rule is absolute in the requirement that a declaration shall be filed on the rule day to which the writ is returnable, independent of the matter of the service, then the second clause, which, in the event of the filing of the declaration, authorizes the entry of a default for want of an appearance not in the terms requiring any service of process as necessary to an appearance, would, with like construction, authorize a default without service of process. It seems to us clear that the two clauses refer to a rule day following a service of process. If this be so, then "the next succeeding rule day thereafter" in the next clause of the rule upon which the declaration is required to be filed or the case shall stand dismissed, is a rule day succeeding a rule day to which a writ has been served and re-

the rule day to which the process is made returnable," to be given operation acording to its literal signification, and does it mean that such declaration shall be filed in a case where there is no service of process and no defendant to declare against?

This clause must be construed with reference to the succeeding parts of the rule, to the statute under which the rule was made, to other rules having a bearing upon the subject, and the common law principles of practice in this behalf.

The next clause in this rule declares the immediate consequence of a failure to file the declaration on the rule day to which the process is made returnable to be that *no default for want of appearance* shall be entered, and as no default for want of appearance can be entered, except where there has been service of process, it is clear beyond question, construing the two clauses together, that the rule day contemplated for the filing of the declaration is a rule day upon which such a default may be entered, and that is a rule day to which a writ is duly served and returned. If the first clause of the rule is absolute in the requirement that a declaration shall be filed on the rule day to which the writ is returnable, independent of the matter of the service, then the second clause, which, in the event of the filing of the declaration, authorizes the entry of a default for want of an appearance not in the terms requiring any service of process as necessary to an appearance, would, with like construction, authorize a default without service of process. It seems to us clear that the two clauses refer to a rule day following a service of process. If this be so, then "the next succeeding rule day thereafter" in the next clause of the rule upon which the declaration is required to be filed or the case shall stand dismissed, is a rule day succeeding a rule day to which a writ has been served and re-

turned. Indeed, upon a careful examination, we cannot see the least room for doubt in the matter, because under the rule a default for want of appearance is contemplated to be possible anterior to the rule day designated by the terms "next succeeding rule day," and that could only be where there had been process served and returned.

Again, the next clause in the rule provides that if the declaration is filed upon or before that day, that is the next succeeding rule day, the defendant shall be held to enter his appearance upon that day, and that the cause shall proceed in all respects as if that had been the original day for the return of process; and it is evident that if the "the next succeeding rule day" is a day anterior to which there has been no service, as defendant in error contends, then clearly a defendant is required to enter his appearance before there has ever been any service of process upon him, and the cause is to proceed against him without notice.

By reference to rule 14 we find that it, if construed without reference to the elementary and fundamental principle of law that a person is entitled to notice, actual or constructive, before he can be required to answer, requires a defendant to plead before service of the writ. Section 6, of Chapter 1938, Laws, provides that "the defendant or defendants shall enter his, her or their appearance on the return day of the writ or summons; * * * and if the defendants shall fail to appear on the return day of the writ or process, the plaintiff may cause a default to be entered by the clerk against the defendant or defendants." There is no literal requirement here that there shall be service of process before default can be entered, and yet in view of the elementary principle of law stated, which it is to be presumed was in the mind of the Legislature, it is clear that the return day meant by the words "return day of the

writ of process" was a return day upon which the defendant had been, by process served and returned, required to appear. In like manner construing the words "rule day to which the process is made returnable," in the first clause of rule 13, in view of this fundamental right of notice, before a defendant can be required to appear and plead, and in view of the provisions of the other clauses of the rule, we can entertain no doubt that they mean, when they occur in the first clause of the rule, the same thing that they evidently do in Section 6 of the statute, that is a rule day to which there has been process served and returned.

Any discussion of the subject from analogies derived from the common law practice in the matter of filing a declaration we deem unnecessary, beyond saying that they all support the construction we give the rule.

The order denying the motion to set aside the order dismissing this cause is vacated; the order of dismissal is reversed and set aside, and the cause will be remanded with leave to plaintiff to perfect service by summons or publication, as the case may be, and for further proceedings by the Circuit Court consistent with this opinion, conformable to this judgment, and in accordance with law.

W. D. CHIPLEY, APPELLANT, VS. A. FRIERSON, APPELLEE.

A claim against a person for withholding the proceeds arising from the sale of goods consigned to him to be sold on commission, is not a debt contracted by him in a "fiduciary capacity," within the meaning of the bankrupt law of 1867.

Appeal from the Circuit Court for Escambia county.

The facts of the case are stated in the opinion.

G. A. Stanley for Appellant.

John C. Avery for appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The 33d Section of the Bankrupt Law of 1867 provided that "no debt created by the fraud or embezzlement of the bankrupt, or by defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this act."

W. D. Chipley, the defendant in the court below, appellant here, was the consignee of a lot of grain shipped to him by Frierson, and on account of the sale of the grain he stood indebted to him in a sum of money. No fraud, deceit or bad faith is alleged. It is a simple debt of factor to principal for amounts realized from sale of a consignment of grain. He (Chipley) became a bankrupt. After his discharge Frierson brings this action against him, and Chipley pleads this discharge in bar of the action.

Upon special verdict finding the amount of the indebtedness, the matter of the discharge not being denied, the court gave judgment for the plaintiff, and defendant prosecutes this appeal to this court.

The question here, therefore is, is the liability of a factor for the proceeds of goods consigned to him for sale released by his discharge in bankruptcy? The solution of this question depends upon the construction to be given to the 33d Section of the Bankrupt Law. The question, therefore, is, is such a debt "a debt created * * * while acting in a fiduciary capacity," within the meaning of that law?

This is a question involving the construction of an act of Congress which can be finally settled only by the Supreme Court of the United States, and it is to be regretted that a case involving the precise point has not been decided by that court.

The views of the courts of the United States and of the tribunals of last resort in the several States have differed upon this subject. A review of the decisions, we think, will clearly show that the decided weight of authority is against the view that such a debt was a debt created while acting in a fiduciary capacity, within the meaning of the bankrupt law.

After the passage of the bankrupt act of 1867, the first case we find involving this question is the case of *In re* Seymour, 1 B. R., 29, s. c.; 1. Ben., 348. The District Court of the United States, S. D., New York, there held that such a debt was a debt created while acting in a fiduciary capacity. In the case of *In re* J. H. Kimball, 2 B. R., 204 s. c.; 6 Blatch, 292, the Circuit Court of the United States, embracing the same District, announced the same view. In Lemcke vs. Booth, 47 Mo., 387, (decided in 1871) the Supreme Court of Missouri, accepting these early decisions as controlling authority, made a similar decision. In a case reported in 46 California, (decided before 1874) which we have not seen, in like conclusion based upon the same decisions was reached. (See remarks of Brickell, C. J., Woolsey vs. Cade, 54 Ala., 383.) In Whitaker vs. Chapman, 3 Lans., 158, (Supreme Court of New York) decided in 1870, the same conclusion based upon the same decisions was reached. The same is true of the case of Banning vs. Bleakly & Co., 27 La., 263, decided in 1875. There is another case in Louisiana holding that such a debt is a debt created while acting in a fiduciary capacity. (31 La. An., 819.) The ground of the decision was because the legislation of that State had stamped the relation of the factor with a fiduciary character. As a matter of course the legislative policy of that State has no operation here.

Two cases are cited by the appellee from the Supreme Court of Georgia as sustaining this view. The citation

from 47th Georgia is a mistake, and the case of Meador vs. Sharp, 54 Ga., 128, we have not been able to examine. The case in the Supreme Court of Illinois, (Matterson vs. Kelly 15 Ill., 549.) decided in 1854, was not the case of a simple indebtediness between principal and factor. The court itself says: "Such was not the character of this (that) transaction." This case it will be observed also was decided in 1854, and did not as a matter of course purpose to construe the bankrupt act of 1867.

The cases above-mentioned are those which sustain the proposition that such is the debt created while acting in a fiduciary capacity. It is seen that they are based upon the earlier cases in New York.

The later cases in the courts of the United States sustain the view that such a debt is not a debt created while acting in a fiduciary capacity.

In the case of Grover & Baker Sewing Machine Co. vs Clinton 5, Biss., 325, decided by Circuit Court of the United States for the Seventh Circuit in June, 1873, that court, following the principle of the decision in the Supreme Court of the United States in Chapman vs. Forsyth, 2 How., 202, as it understood that case and the decision of the Supreme Court of Massachusetts in Cronan vs. Cotting, 104 Mass., 245, decides that such a debt is not a debt of the character stated. This court refers to the decision in New York, and remarks that the reasons there assigned "fail to satisfy us of the correctness of their conclusions." It is there said also that "we do not believe that Congress intended by the slight and insignificant change in the phraseology in the present act (that of 1867) to alter the defined meaning and judicial construction given to the act of 1841, and hence regard the decision under that act as binding upon the courts in construing the present act." The opinion in this case was rendered by the District Judge, but Mr. Justice

David Davis, of the Supreme Court of the United States, concurred in the opinion.

The next case we find in the courts of the United States is the case of Owsley vs. Cobin, in the Circuit Court of the United States, South Carolina, in June, 1877, 15 B. R., 491, decided by Chief-Justice Waite, of the Supreme Court of the United States. Such a debt is there held not to be of the character excepted from the operation of the discharge in bankruptcy. The opinion simply announces this conclusion and an acquiescence in the reasoning of the decision in Chapman vs. Forsythe, 2 How., 208, in Cronan vs. Cotting, 4 N. B. R., 667, and in Grover vs. Clinton, 8 B. R., 313, S. C., 5 Biss., 325, which we have already commented upon.

The next case we find is that of Keime vs. Groff & Co., 17 N. B. R., 319, in the Circuit Court of the United States, W. D. Penn., decided in March, 1878. This court follows the decision before referred to, and alludes with disapproval to the New York cases. In disposing of the question this court, like the others sustaining this view, remarks: "That the 33d section of the bankrupt law is substantially the same with its kindred section in the act of 1841, and that its scope and meaning are therefore authoritatively determined by the decision of the Supreme Court" of the United States in Chapman vs. Forsythe, 2 How., 202.

The next case we find is that of *In re* Smith, *et al.*, decited by the District Court U. S., S. D. New York, May 29, 1878, 18 N. B. R., 26. This is the same District in which the decisions of Judges Blatchford and Nelson were rendered. These decisions were, as we have seen, based upon the view that the 33d section of the act of 1867 was much broader in its terms and meaning than the corresponding section of the act of 1841, but the court in this case of *In re* Smith holds to the contrary, and that

such debt of a factor is not excepted. In the case of Neal vs. Clark, 95 United States, 708, the Supreme Court of the United States, in October, 1877, while not covering the precise point here involved, does hold that the like process of reasoning by which the same court in Chapman vs. Forsythe, 2 How., 202, arrived at the conclusion that the debt of a factor was discharged under the act of 1841, may be properly employed in construing the corresponding section of the act of 1867. Not wishing to extend this opinion to an unreasonable length, we will not insert that reasoning here, but will only say that to any one having sufficient interest in the subject to induce an examination of that case it will be clear that the result of the application of the reasoning there employed to the act of 1867 sustains the view that a factor's debt is not excepted from its operation.

In the State courts we find the decision of the Supreme Court of Massachusetts in Cronan vs. Cotting, 104 Mass., 246, decided in 1875, cited in several cases as sustaining this view, (see 54 Ala., 388,) is placed upon the ground that Chapman vs. Forsythe controls the subject, there being no substantial difference in the acts; that this had been the previous judicial construction, and that if Congress had a different intention it was to be presumed that it would have been indicated by some distinct provision to that end. The preceding decisions in the District and Circuit Courts of New York to the contrary are disapproved. In Hannequin vs. Clews, 77 New York, 431, a case decided by the Court of Appeals of New York after the decisions in Lansing in the Supreme Court of New York, and therefore the controlling authority, Church, Chief-Justice, delivering the opinion, held the decision in Chapman vs. Forsythe to be in point and controlling, and that such a debt was not excepted. Allusion is made to the early cases in the South-

ern District of New York in this case. It certainly cannot be necessary to do more in this connection than to refer to the other and later cases in the State courts sustaining this view.

The same conclusion is reached by the Supreme Court of Alabama in 54 Ala., 378, decided in 1875; by the Supreme Court of Massachusetts in 107 Mass., decided in June, 1879; by the Supreme Court of Pennsylvania in 92 Penn. State, 109, decided in November, 1879; and by the Supreme Court of Mississippi in 57 Miss., 599, decided in April, 1880.

These decisions are based upon two grounds: First, as a matter of authority and precedent, and as fixing the rule of construction upon the decision of the Supreme Court of the United States in Chapman vs. Forsythe, it being held that there is no substantial difference in this respect between the act of 1841 and the act of 1867. Second, that as a matter of construction it should not be held that such a debt is excepted from the operation of the act, because it would be inconsistent with the policy, purpose, object and intent of the bankrupt act, in that it would be inconsistent with "the object and intention of Congress in enacting this general law by which the honest citizen may be relieved from the burden of hopeless insolvency," and that "a different construction would be inconsisent with the liberal spirit which pervades the entire bankrupt system."

In Chapman vs. Forsythe, 2 How., 202, speaking of the act of 1841, the Supreme Court of the United States remark, when considering the matter of a factor's debt to his principal, "if the act embraces such a debt it will be difficult to limit its application. It must include all debts arising from agencies, and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor; such a construction would have left but four debts on which

the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of the trust. But this is not the relation spoken of."

It is for these reasons that courts of the United States seem disinclined to limit the operation of a discharge in bankruptcy, and are rather disposed to extend its operation in view of the general purpose which it was designed to accomplish and the policy upon which it was founded; that is, to relieve from all debts in which there is not some element of trust or other matter of a fiduciary character involving something more than the violation of that ordinary commercial confidence and reliance which exist in most transactions incident to ordinary trade and commerce.

In this matter the courts of the United States must give us the rule of decision. While there is a difference, the overwhelming weight of authority is against excepting this debt from the operation of the bankrupt act, and we are satisfied that the decisions which control our judgment were not accessible to, and could not have been seen by, the Judge of the Circuit Court who decided this case.

The evident policy of the act has, in a great measure, controlled its construction in this and many other respects, and, as a matter of course, what we have said in no manner proposes to define the relation of principal and factor outside of the operation of the bankrupt act.

The judgment is reversed, and the case will be remanded with direction to enter judgment for the defendant upon the merits.

HYER AND HYER, PLAINTIFFS IN ERROR, VS. AMBROSE VAUGHN, DEFENDANT IN ERROR.

1. An amendment to a declaration, after plea filed, by interlining in the original the partnership name of the defendants, as the name was stated in the plea, no objection having been made to such mode of amendment, is not an irregularity of which the court will take notice.
2. A motion in arrest of judgment, where the verdict and judgment are in favor of the plaintiff, will not be granted if the declaration on its face shows a valid cause of action and is not demurrable.
3. Where a cause has been tried upon several issues, but some of them are immaterial and a verdict is rendered for plaintiff upon the whole case upon the merits, a judgment *non obstante veredicto* cannot be given for the defendant upon the ground that some of the immaterial issues should have been found in favor of the defendant. If the verdict had been in favor of the defendant upon such immaterial issues, still the plaintiff would have been entitled to judgment *non obstante*.
4. It was not error in such case to refuse a motion by the defendant, that a repleader be ordered where the pleadings on the part of the defendant raise immaterial issues and it is apparent from the whole case that no manner of pleading the matters embraced in the pleas would have made them available. A repleader is only ordered upon the form and manner of pleading, where the matter is substantial.

Writ of Error to the Circuit Court for Escambia county.

Vaughn declared against Albert Hyer and W. K. Hyer as partners, and afterwards amended the declaration by inserting in it by interlineation the style of defendants, so as to read, "partners, under the firm name and style of Hyer Bros." Precisely when this amendment was made is not shown.

The declaration was in assumpsit, and at first contained but one count. It alleged that in 1871, and divers other days, plaintiff deposited with defendants as bankers sundry sums of money, drafts, &c., and defendants promised to pay

plaintiff the amount with interest, and that on March 15, 1878, there was a balance of such deposits due him of $1, 700, which defendants refused to pay on demand.

Afterwards, before plea, plaintiff filed a second count to his declaration containing substantially the same allegations, and adding, that on the 15th March, 1878, defendants admitted that there was a balance due plaintiff on said deposits of $1, 700, and payment being demanded on that day defendants refused to pay, claiming that defendants had a right by contract with plaintiff to retain sums due on deposits for one year after they became due, paying interest thereon, and that more than one year had since elapsed and defendants still refused to pay.

For a *first* plea defendants say that it is not true, as alleged, that any deposit of money was made with Albert Hyer & W. K. Hyer, partners, but that if such deposits were made "they were made with Hyer Bros."

Defendants for a *second* plea say that the cause of action did not accrue within three years next before suit.

Defendants filed a *third* plea denying that the deposits were made by plaintiff with defendants, as alleged, but that plaintiff in 1871 deposited with Anderson Hyer & Co. $2,300, and that defendants paid plaintiff's checks more than the amount subsequently deposited with them by him.

Plaintiff demurred to the second and third pleas, and the demurrer being overruled he joined issue on the first plea, and for replication to the second plea alleged new promises within two years to pay plaintiff, if indulged, and plaintiff did indulge defendants.

For replication to the third plea plaintiff alleges that said deposits were originally made with Anderson Hyer & Co., and at the dissolution of that firm Hyer Bros. assumed the payment of the balance due plaintiff on such deposits, which

plaintiff assented to, and made with defendants additional deposits from time to time, and drew from such deposits divers sums, according to the alleged agreements, until the total amount due was reduced to the sum sued for.

Defendants demurred to these replications to the second and third pleas. The demurrer to the replication to the second plea was overruled, and the demurrer to the replication to the third plea was sustained. Defendants filed rejoiner to the replication to the second plea denying its averments.

Plaintiff then filed a *third* count to his declaration, alleging that defendants owe him $2,500 for balance of deposits made with the late firm of Anderson Hyer & Co., which was composed of the defendants and one Wm. E. Anderson, the defendants, upon the dissolution of that firm, assuming, with the assent and agreement of the plaintiff, to pay him the said balance due.

Defendants demurred to this count and the demurrer was overruled, with leave to defendants to plead over.

The parties proceeded to a trial, and a verdict was rendered in favor of plaintiff for $1,951.97, upon which judgment was duly entered against defendants.

Defendants then moved in arrest of judgment on the grounds that it appeared upon the face of the pleading that the issues tendered by the first and third pleas are admitted by the amendments subsequent to the filing of said pleas to be true as claimed by the defendants. This motion was denied.

A motion for a new trial, on the ground that the verdict was against the law and the evidence and the charge of the court, was overruled.

Defendants then moved for judgment on the first and third issues, *non obstante veredicto*, or that a repleader be directed. This motion was denied by the court.

The bill of exceptions contains the testimony given upon the trial, plaintiff being the only witness. No question was made and no exception taken to the testimony or any ruling thereon.

The rulings of the court upon the motions in arrest of judgment for a new trial and for judgment *non obstante veredicto,* are alleged as erroneous.

The plaintiff's testimony shows that about the year 1870 plaintiff deposited seven or eight hundred dollars in gold with Anderson, Hyer & Co., and soon afterward about the same amount in currency, and other amounts at other times; that he drew out some and one of the defendants asked him to let his money remain and they would pay interest on it at ten per cent. Plaintiff agreed to this, reserving the right to draw it whenever he wanted it, and this was agreed to. When Anderson left the firm defendants told him they would keep his money on the same terms, and this was assented to by plaintiff. Defendants continued to pay interest on the money according to this agreement until about January, 1878. This change in the firm occurred about four of five years before suit was brought, which was in April, 1879. About a year before suit was brought he went to them to draw some money, and they informed him they had a right to keep it one year after they were notified that he wanted it, as they were paying him interest on it. He waited the year and then gave an order for some money, which they refused or failed to pay. Calling on them they did not let him have the money, because it was "deposited in timber." Albert Hyer said if I sued he would make me lose half of it. Defendants paid me the interest at 10 per cent. up to about January, 1878. I had a book in A Hyer's hand-writing showing that they owed me $1,700, and he said that was the amount they owed me. Since the commencement of this suit he proposed to let me have

some of the money and secure the balance if I would dismiss the suit.

C. C. Yonge for Plaintiffs in Error.

D. L. McKinnon for the Defendant in Error.

THE CHIEF-JUSTICE delivered the opinion of the court.

The first and second counts of the declaration show a case of action in favor of plaintiff and against defendants.

The first plea does not deny the alleged indebtedness, but says the money was not deposited with defendants, A. & W. K. Hyer, partners, but if such deposits were made they were made with Hyer Bros. The alleged partnership is not denied, or that Hyer Bros. was composed of the defendants alone. The partnership *name* is of no consequence in pleading, unless in a suit upon a contract made in the particular name it may become material. (1 Evans' Pl., 97.) This plea then, so far as it is pertinent, is an admission of the indebtedness alleged, the only real issued raised by it being as to the *name* of the firm composed of the defendants.

The second plea is the statute of limitations, and as to that it is put in issue by replication alleging an admission of the indebtedness by defendants within two years or less, and promises to pay. This issue is accepted by defendants' rejoinder.

The third plea does not negative the alleged indebtedness, or that the defendants had on deposit the money of the plaintiff, as he alleged. The plea is evasive and uncertain, and did not raise a material issue, because it did not show anything inconsistent with the allegations of plaintiff as to the indebtedness. If Anderson, Hyer & Co. had plaintiff's money on deposit, and, on the withdrawal of Anderson from the firm, these defendants kept and retained possession of this

money, engaging with him to keep it for him, (and that is what the proof shows,) the allegations in the first two counts are true, and the matters of the third plea may be also true but not inconsistent with the declaration.

The third count of the declaration was added after the judgment of the court sustaining the demurrer of defendants to the plaintiff's replication to the third plea, and by leave to amend. This count alleges deposits by plaintiff with Anderson, Hyer & Co., the withdrawal of Anderson from the firm, defendants (the remaining members) assuming and agreeing with plaintiff to pay him the money. This count was demurred to and the demurrer overruled, as it should have been.

The testimony in the case is sufficient to sustain either count of the declaration. It shows an account opened in 1870 or 1871, plaintiff commenced making deposits with Anderson, Hyer & Co., and drawing on them from time to time until the dissolution by the withdrawing of Anderson; that defendants continued the business, took possession of plaintiff's money on deposit there with his consent, and paid interest annually until 1878, when they found it convenient to stop paying his checks, and demanded a year's time in which to pay the acknowledged balance.

Now, when the deposits were transferred from the account of Anderson, Hyer & Co. to Hyer Bros. with plaintiff's assent, and the defendants' express agreement to pay, and treating the deposits as made with them, it was, in fact and in law, a deposit of so much money by plaintiff with defendants, as alleged in the first count.

The defendants' plea of the statute of limitations, however available it might have been to Anderson, is overcome by the proof of the acknowledgment of the debt by these defendants, as well as by the promise to pay, which are both clearly proven by the testimony within the statutory period.

The motion for a new trial was properly overruled, because the verdict was agreeable to the law and to the evidence, and we presume it was in accord with the charge of the court. The charge is not in the record.

The motion in arrest of judgment was placed upon the grounds that the matters of the first and third pleas are admitted by the amendment made subsequently to filing of the pleas to be true.

But if the declaration had been substantively defective it was made good by the amendments. No question is raised by the record that the amendments were not legally and regularly made, and we must consider them so made. The defects, if any there were, having been cured by amendment, there is no ground for arresting the judgment. As there is no intrinsic cause now appearing on the face of the declaration, the motion in arrest cannot be granted. (Sedgwick vs. Dawkins, 18 Fla.; 3 Burr., 1725; 6 Taunton, 650; 2 Tomlin's Law Dict., 291; Tit. Judgment, Tidds' Pr., 826.)

As to the motion for judgment on the first and third pleas notwithstanding the verdict, or that a repleader be directed, it is to be remarked that the first plea set up matter entirely immaterial, as we have before remarked, but it seems that to avoid cavil, the plaintiff, without objection being made to the method, amended by writing upon the face of the declaration the name of the firm. And as to third plea, as we have said, it shows nothing inconsistent with or avoiding the allegations of the declaration, and offers no matter of defence, and, by not denying, admits that the defendants hold plaintiff's money on deposit and refuse to pay it.

Judgment *non obstanté* is given only where it is clearly appearant to the court that the party who has succeeded has upon his own showing no merits, and cannot have by any

manner of statement. (2 Bouv. Dict., 440.) In Tatum vs. Tatum, 19 Ark., 194, 199, the court says: "We are clearly of opinion that if the court below had permitted the parties to go to a trial upon the issues to the four pleas, even if the finding had been for the defendants, the judgment necessarily must have been *non obstante* for the plaintiff, for the reason that the matter set up in those pleas, in no mode or manner of stating it, could bar or preclude the plaintiff from a recovery on his cause of action." And see Stephen Pleading, 97. The rule as laid down by Lord Mansfield in Rex vs. Philips, 1 Burr., 301, in regard to an immaterial issue and a verdict upon it, is that when the finding upon it does not determine *the right*, the court ought to award a repleader, *unless it appear from the whole record that no manner of pleading the matter could have availed.* A judgment, therefore, *non obstante veredicto*, is always *upon the merits;* and a repleader upon the form and manner of pleading. 16 Johns., 230; 2 Tidd's Pr., 831.

In Hazard vs. Purdom, 3 Porter, 43, (cited by counsel for plaintiff in error) it was held that "there was error in refusing to charge the jury, on request, that if the evidence established the truth of the second or third pleas they must find the issue taken thereon in favor of the defendant. Such is the correct rule of practice regardless of the materiality of the issue; it must be found *according to the facts in evidence.*" The pleas were immaterial, but the court having been requested to charge the jury to find the facts *upon those issues,* should have done so. The case in 7 Ala., 457, is to the same effect, but in neither case is it said what the judgment should have been upon such a verdict. But in Cullum vs. Br. Bank, 4 Ala., 21, 39, the court gives the rule. They say: "We do not question the right of the defendant, even under such a state of defective pleading, to require the court to instruct the jury to find a verdict on

the proper issue sustained by his proof, because, in that event, the plaintiff would be placed in condition to extricate himself from the vicious plea by a motion to enter a judgment *non obstante veredicto.*" Stephen on Pl.,. 129.

We conceive that if the defendants in this case had asked the court to instruct the jury to find the issue in favor of the defendants upon the first and third pleas, and the court had so instructed the jury and the jury had so found, still upon the pleadings and the evidence it would have been the duty of the court to give judgment for the plaintiff *non obstante,* because the pleas were not substantial and did not warrant a judgment for the defendants, and it was not the duty of the court to direct a repleader, because, as is said in Tidd's Pr., 829, 831, that "if the plea contain a defective title or ground of defence, by which, if it is apparent to the court upon the defendant's own showing, that in any way of putting it he can have no merits, and the issue thereon be found for him, then, as the awarding a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto.* But where the defect is not so much in the title as in the manner of stating it and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, then, for their own sake, they will award a repleader."

Here the defect of the defendants' pleading is not "in the manner of stating it," but it is apparent "that in any way of putting it he can have no merits," and there is no doubt upon the whole case that the court should give judgment for the plaintiff, and that a repleader would be fruitless.

We find no error in the judgment, and it is affirmed.

M. C. STOKES, PLAINTIFF IN ERROR, VS. HENRY BAARS, DEFENDANT IN ERROR.

1. A contract to deliver a certain quantity of timber at so much per foot, to be inspected, and to be delivered "as fast as water will permit, and to be completed not later than June 15, 1880, payment cash on handling specifications," is an entire and not a severable agreement.
2. On delivery of a portion of such timber, duly inspected, the purchaser refuses to pay the full price but deducts $200, being the amount of a draft previously drawn on him by the seller, which the purchaser falsely says he has paid, on the faith of which statement delivery was made, and the $200 remains unpaid. This is not a compliance by the purchaser, and is such a breach of the contract that the seller may refuse further delivery under it.
3. After such breach, (the purchaser having assigned the agreement for the benefit of his creditors) the assignor in his own right, or for his assignees, cannot recover damages for subsequent non-delivery to him.
4. The assignee of such a contract takes it subject to all defenses available against the assignor.
5. The purchaser of a certain quantity of timber under a contract to pay for it on delivery, from time to time, by becoming insolvent and making an assignment for the benefit of creditors, is disabled to perform, and thenceforth neither he nor his assignees can claim damages for future non-delivery to the assignees, with whom the seller did not contract.
6. In a declaration in a suit by the purchaser against the seller for breach of a contract by the seller who engages to deliver 2,500 pieces of timber "as fast as water will permit, and to be completed not later than the 15th of June," it is essential to allege that the water was such as to permit the delivery, this being evidently a condition of the contract to deliver.
7. A demurrer by a plaintiff to a plea of the defendant reaches essential defects in the declaration, and if that be defective the demurrer to the plea should not be sustained.

Writ of Error to the Circuit Court for Santa Rosa county.

Suit was commenced by Baars for the use of Knowles &

Brent, assignees for the benefit of creditors, upon a contract by Stokes to deliver, within reach of steamer at Milton, 2,500 to 3,000 pieces of sawn timber of certain quality and size, and at a fixed price per cubic foot. Timber to be inspected by F. R. Goulding, and in accordance with the rules of last season. Delivering as fast as water will permit, and to be completed not later than 15th of June, 1880. Payment cash on handling specifications.

The declaration avers that on April 9, 1880, Baars assigned the contract to Knowles & Brent for the benefit of plaintiff's creditors; that prior to the assignment the plaintiff, and since then the assignees, have been ready and willing to receive and pay for the timber in accordance with the terms of the contract, but defendant has not delivered more than 1,300 pieces, but has wholly refused and neglected to do so, whereby the plaintiff has lost great gains and profits which he would have made but for defendant's default.

Defendant interposed twelve pleas, upon four of which issue was joined, and to the others plaintiff demurred.

The second plea alleges that he delivered timber to plaintiff before the assignment, but Baars failed and refused to pay for a large portion thereof; since which defendant declined to make further delivery.

The third alleges that plaintiff, before the assignment, violated the agreement by failing to pay cash for timber delivered; wherefore defendant made no further delivery.

The fourth plea alleges that before the assignment defendant began to deliver under the contract; that before any delivery, and in anticipation thereof, he drew on plaintiff for $200, and plaintiff accepted the draft; that about the time of its maturity defendant was ready to deliver timber and tendered specifications under the contract, and demanded payment therefor; plaintiff paid for the delivery

less the $200 acceptance, which plaintiff said had been paid, and defendant, relying on such statement, delivered the timber; that said draft in fact had not been and has not yet been paid; wherefore defendant declined to make further delivery.

Seventh plea, that plaintiff was not at the time of the breach alleged ready to receive and pay for the timber according to the contract.

Eighth plea, that plaintiff assigned the contract to Knowles & Brent before the alleged breach.

Tenth plea, that at and before alleged breach, and before the assignment, Baars was insolvent.

Eleventh plea, that he delivered timber in compliance with contract up to the time of the assignment, and upon last delivery $200 remains unpaid, which Baars neglected and refused to pay; that Baars was insolvent and assigned all his property to K. & B., and the latter have not paid the said $200 so unpaid by Baars.

Twelfth plea, substantially the same.

To these pleas plaintiff demurred:

To the second, third and fourth, because the alleged breach by plaintiff did not release defendant; and because these pleas show a waiver by defendant of the breach alleged against plaintiff.

To the seventh, because it does not negative the readiness and willingness of the assignees to pay.

To the eighth, because the alleged assignment did not release defendant from performance.

To the tenth, because the insolvency of plaintiff is not alleged to the time of breach, and because the assignees are not alleged to have been insolvent.

To the eleventh and twelfth, because the alleged nonpayment by plaintiff and by assignees did not excuse performance by defendam To each of the pleas, that they are insufficient.

The court sustained all the demurrers, and upon trial of the issues joined plaintiff recovered judgment for $810 and cost.

The errors assigned are that the court overruled the pleas sustaining the demurrers.

G. G. McWhorter and *John C. Avery* for Plaintiff in Error.

W. A. Blount for Defendant in Error.

THE CHIEF-JUSTICE delivered the opinion of the court.

Was this *contract* entire or severable? We first examine the agreement and authorities cited by defendant in error. Parsons on the Law of Contract (3d Ed., Sec. 4, pp. 29, 30,) says: "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." This is illustrated by the case of Johnson vs. Johnson, 3 Bos. & Pull., 162, where plaintiff had purchased from the same party two parcels of real estate, the one for 700 pounds, the other for 300 pounds. After payment and possession delivered, plaintiff was evicted from one parcel in consequence of a defect in the title, and brought his action to recover back the price of the latter. The court held that he could recover, for although both pieces of ground were bargained for at the same time the bargain must be considered as consisting of two distinct contracts, and in the case of Robinson vs. Green, 3 Metcalf, 159, where an auctioneer engaged with another to sell a large number of lots of wood, part of them in another county where the auctioneers could not legally sell, and wherefore it was claimed that the contract for services as auctioneer was entire, and being in part

illegal, the action could not be sustained, the court held that the sale of each lot was a distinct contract, and the plaintiff's claim for compensation arises upon each sale, and is complete on each sale. "If there were an express promise to pay him a fixed sum for the entire sale it would have presented a different question."

Says Parsons: "If the consideration to be paid is single and entire the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items. The mere fact that the subject of the contract is sold by weight or measure, and the value is ascertained by the price affixed to each yard or pound or bushel of the quantity contracted for, will not be sufficient to render the contract severable." Parson Con., 31, 32, and cases noted.

In Boone vs. Eyre, 1 H. Bl., 273, note, there were mutual covenants going only to parts of the consideration, and because the defendant had his remedy on the covenant he could not plead a breach of a condition precedent. That was a case of a sale of a plantation and slaves with covenant of title for a money consideration, and as a further consideration a covenant to pay an annuity. The case of Franklin vs. Miller, 4 Ad. & E., 599, decided that the plea was bad, (in a case of mutual covenants) as showing only a partial failure of performance by plaintiff, which did not authorize defendant to rescind the contract, but he must rely on the covenants.

The court in Perkins vs. Hart, 11 Wheat., 237, say: "That if the contract was fully performed in relation to any one subject covered by it, * * the plaintiff might well maintain an action of indebitatus assumpsit for his stipulated compensations in cash, on that transaction, and was not bound to wait until all the lands to which his agency extended were disposed of. Where the agreement embraces

a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed."

Sickles vs. Pattison, 14 Wend., 275, merely affirms that where there is an entire contract for performance, the party failing to perform is not entitled to maintain an action for part, except where there is a stipulation for payment of a part performance.

It is correctly claimed by counsel for defendant in error that if the contract is severable, a failure of plaintiff to perform one of several stipulations which is independent of the other would not authorize the defendant to refuse to proceed with his part; and that a refusal of the plaintiff to perform must, in order to entitle the defendant to rescind, be absolute and unqualified. It was so held in Smoot's case, 15 Wall., 36, 48; Benj. on Sales, §568; Smith's Lead. Cas., 28, 37; 8 Bing., 124; 7 Ad. & Ellis, 557; 4 Best & Smith, 295, and other authorities cited by counsel, and I do not understand this position to be questioned by counsel for plaintiff in error. But it is said on the other side that this is not a several or severable contract but is entire. Plaintiff in error insists that there is but one contract here, and that is an agreement on his part to deliver a certain number of pieces of timber, water permitting, by a certain day, all deliverable on the first or the last day named, or by such installments as may be convenient to himself, and to be paid therefor at the rate of so much per cubic foot, on handing to plaintiff specifications of measurement of timber ready for delivery. In Clark vs. Baker, 5 Met., 452, there was a purchase of a cargo of yellow and white corn on board seller's schooner, quantity not known, one price for the yellow and another price for the white, it was held that the contract was entire, and it could not be

allowed that there was a separate contract for each bushel or for each kind of corn.

Gardner vs. Clark, 21 N. Y., 399, was an action by an assignee of Gardner against Clark for damages for the non-performance of a contract to sell and deliver a thousand bushels of barley at 54 cents per bushel, at a store house, *to be paid for as fast as delivered*. Defendant pleaded that a portion of the barley had been delivered, and that he had always been willing and ready to deliver the residue according to the terms of the contract, but that Gardner was not ready or willing to receive or pay for the same according to the contract. It was held that though defendant had not demanded payment for each load that had been deliverd, yet he had a right at any time upon being ready to deliver a load, and offering so to do, to demand payment for such load, and that upon non-compliance by plaintiff the contract was broken on his part. It is evident that the court thought that an *entire* contract and that the rescission was concurred.

The case of Withers vs. Reynolds, 2 B. & Ad., 882, 22, (Eng. Com. Law) was this: "Reynolds aggreed to supply Withers with straw, to be delivered at W.'s premises, at the rate of three loads a fortnight, until 24th June, 1830, at 33 shillings per load, and W. agreed to pay R. the agreed price for each load so delivered. The straw was delivered from October, 1829, till January, 1830, at which time plaintiff being in arrears for several loads defendant demanded the amount, and plaintiff then tendered defendant the price of all the straw delivered except the last load, saying, 'he should always keep one load in hand' Defendant objected, and was obliged to take the money offered, and then told plaintiff he would send no more straw unless it was paid for on delivery, and no more was sent. Plaintiff then sued for damages for non delivery of

straw. The court decided that plaintiff having expressly refused to pay for the load as delivered, according to the contract, the defendant is not liable for ceasing to perform on his part."

Coleridge, J., in Franklin vs. Miller, 4 Ad. & Ellis, 599, says: "The rule is that in rescinding, as in making a contract, both parties must concur. In Withers vs. Reynolds each load of straw was to be paid for on delivery. When the plaintiff said he would not pay for the load on delivery that was a total failure, and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract."

There is in Smith's Leading Cases, pp. 36, 37, &c., (5 Am. Ed.) an examination of many cases collated upon this point, from which it is established that "where one contractor has absolutely refused to perform, or rendered himself incapable of performing his part of the contract, the other contractor may, if he please, rescind, such act or such refusal being equivalent to a consent to the rescission."

The Supreme Court of Illinois in Bradley vs. King, 44 Ill., 339, had a case *quatnor pedibus* with the present respecting the question of entirety of the contract and recission. Bradley & Co., by sealed articles with King & Brothers, agreed to deliver to the latter in Chicago one million feet of lumber. King & Bros. agreed to pay $2,000 down, $1,000 March 15, $1,000 on the first and $1,000 on the 15th April, and the balance as fast as the lumber should be received, the whole to be delivered by September 1. On that day there had been delivered only about 218,000 feet. Between that and September 29 nearly 600,000 feet more were delivered. An action of covenant was brought by purchasers against vendors for failure to deliver lumber as required by the contract. The court below sustained a demurrer to the third plea, which averred that for the

last cargo delivered to and accepted by plaintiffs they refused to make payment. The court say that "although the acceptance by the plaintiffs of a part of the lumber after the 1st September was a release of damages for non-delivery only as to the portion accepted, there being no express waiver yet when on the 29th September the defendants delivered, and the plaintiffs accepted a cargo, it was clearly accepted on the terms of the original contract as to payment. Its acceptance placed the purchasers under the same obligations as to payment that they would have been under had the cargo been delivered prior to the 1st of September, and that obligation was, by the terms of the contract, payment on delivery. If the purchasers refused to perform this obligation on their part the vendors were excused from further delivery. The payment for the lumber at the time of its receipt was a condition precedent, so far as concerned the right of the plaintiff to demand further delivery."

The plea was held good.

All the cases hold that a refusal to pay for the part delivery, as required by the terms of the contract, is an abandonment on the part of the party refusing to pay, and is such an absolute unqualified refusal to perform that the seller may also treat the contract as rescinded, and is under no obligation to perform further on his part.

Was there then a refusal to pay on the part of Baars, at the time of the part delivery of the lumber, as alleged in the pleas of the defendant Stokes in this case?

The second and third pleas aver that Baars refused to pay for quantities of timber delivered under the agreement, wherefore defendant made no further delivery. These are good pleas according to the uniform language of the decisions. The fourth plea avers that in anticipation of delivery, the defendant drew on Baars for $200, which draft was accepted by him, and that on making delivery of tim-

ber to Baars, with specifications, the latter paid him therefor, excepted the $200 acceptance which Baars said had been paid, and relying on this statement defendant made delivery, but that in fact the $200 acceptance had not been paid by Baars, and has not yet been paid, and defendant therefore declined to make further delivery.

It does not appear that the $200 draft was delivered or received as a payment, but on the false representation that it had been paid, and defendant supposing it had been paid, he treated it as a payment and delivered the timber. If that $200 had not been paid Baars had not complied with the condition of delivery, but had deceived defendant, and by the deception had obtained the delivery without payment. But plaintiff's counsel insists that "the plea should have alleged a destruction of the acceptance, or should have offered to return it, and that he cannot leave the acceptance outstanding, with the right of suit upon it."

But if it is outstanding, it is because Baars has not paid, and he being now insolvent, "the right of suit," it is more than probable, will be exercised against defendant rather than against Baars. When Baars pays it, it will be simply paying what he owes, so that he will lose nothing. It was his failure and refusal to *pay*, according to his contract, that gave defendant the right to join him in repudiating it.

Other pleas of the defendant are that Baars was not ready to receive and pay for the timber, according to the contract; that he had before breach assigned to Knowles & Brent; that Baars was insolvent, and that K. &. B. have not paid the $200 remaining unpaid on the first delivery.

While court of law permit and protect assignments of choses in action to a certain extent, yet there can be no right of action at common law by the assignee in his own name, except upon an express promise, but the suit may be in the name of the assignor for the benefit of the assignee,

and in that case the defendant may avail himself of all the defences he might have had against the assignor. 1 Parsons on Con., 3d Ed., 195, 196.

The assignees can have no greater or other right than the assignor had at the time of the assignment. No right was created against Stokes by the assignment. Stokes contracted with Baars, and not with the assignees. The latter cannot take the position of the assignor without the assent of the other party to the contract. There is no reciprocity of duty as to them; no action could be maintained against them for a breach of the assigned contract. Baars had become disabled to comply with his side of it, and it is laid down that when a party has incapacitated himself from performing, the same consequence follows as if he had absolutely refused to perform. In Robson vs. Drummond, 2 B. & Ad., 303, Robson and Sharpe were partners, and Sharpe made a contract in his own name with Drummond for the hire of a coach for five years, Sharpe to keep it in repair. The contract was with Sharpe alone, although Robson & Sharpe carried on the business. At the end of three years Sharpe dissolved the partnership with Robson and transferred the coach, and the entire business to the latter. Robson offered to go on and carry out the contract of Sharpe, but Drummond refused to have anything to do with him. Sharpe said he could not complete the contract as he had assigned it to Robson. Robson & Sharpe then sued Drummond on the contract, and were non-suited. In the K. B., Parke, J. said, that "the very fact of Sharpe having transferred his interests to Robson, was equivalent to saying, I will not perform my part of the contract." Patterson, J., said: "It was in substance a case where a person having made a contract in his own name attempts to back out of it, and transfer it to a third person. That he had no right to do."

The case of Reader vs. Knatchbull is referred to by counsel for plaintiff in error, but the only report of the case we have been able to find is in a note in 5 T. R., 218, where it is said that plaintiff declared upon an agreement, by defendant, to deliver him a quantity of Manchester cottons. The defence was, that after the making of the contract, the plaintiff had compounded with his creditors. Buller, J., told the jury that if they believed the plaintiff was really in such a situation as to be unable to pay for the goods, if delivered, that was a good defence in point of law.

Counsel for plaintiff in error also refers to *ex parte* Chalmers. *In re* Edwards, cited in Benjamin on Sales, §759, which says that "if goods are deliverable by successive instalments, the assignee of the bankrupt purchaser cannot adopt the contract and claim further deliveries under it, without paying the price of what was delivered prior to the bankruptcy."

Defendant in error replies that this rule is not applicable because it was the case of a bankrupt against whom all personal remedies are taken away by the discharge, and the law will not allow the assignees to insist upon the performance by the other contracting party from whom all remedy is taken, without paying his claim against the bankrupt; and this is a case of a voluntary assignment by an insolvent, against whom the plaintiff in error retains all personal remedies for breach of the contract. We think this argument proves too much against the position of the defendent in error, considering that the contract in this case is *entire,* and not servable. Why should the defendant pay the assignees damages, which he would not be obliged to pay to the assignor, if no assignment had been made? And besides the assignees take only what is assigned, and if the assignor had or could, or could have had no claim for damages, then no such claim passed by the assignment.

If the assignees take anything by the assignment, they take it entire and *cum onere*, and they cannot be allowed to take it partially; they must accept or reject it *in toto*. But the suit is in the name of the assignor, and he cannot recover for the benefit of assignees and creditors what he could not demand for himself.

Our conclusions are: *First*. That this contract is entire and not severable. *Second*. That the plaintiff did not pay for the timber delivered, though payment was demanded, and that this was a positive and absolute repudiation and abandonment of the contract on his part, giving defendant the right to treat it as rescinded, and to refuse further delivery under it. *Third*. That after such breach by the purchaser, he cannot maintain a suit in his own behalf or in behalf of his assignees to recover damages for non-performance. *Fourth*. That Baars having become disabled to perform by insolvency and an assignment to creditors, neither he nor his assignees could claim damages for a failure to make future delivery of timber under the contract to the assignees with whom he had not contracted.

In view of our further conclusions, it is necessary to examine the pleas in detail and pass upon the sufficiency of each of them. What has already been said will indicate what judgment ought, in our opinion, to be given upon the several demurrers to the pleas. The demurrer to the pleas reached back to defects in the declaration, and if that is substantially defective it must be amended before an issue of fact can be required of the defendant.

The declaration sets out a contract for the delivery of a quantity of timber, delivery to be made "*as fast as water will permit*, and to be completed not later than 15th June, 1880."

This condition is material. It is that the "water will permit" performance. If the water would not permit de-

livery, (a contingency here expressly recognized,) the defendant was not bound to deliver, and there would be no breach. He cannot be held to perform what is impossible, when he has expressly stipulated that he would make delivery ouly in case delivery is practicable on account of the condition of the water. This is the only reasonable construction to be given to this agreement. It is not an absolute contract to deliver in any event, but only so far as water will permit such delivery.

Such being the proper construction of the agreement, it is necessary to show by the declaration what is not therein alleged, that defendant was not prevented by water from making delivery. for otherwise he could not be charged with the breach by neglecting to deliver.

He was not bound to deliver unless the water would permit. In Russell vs. Nicoll, 3 Wend., 112, where Nicoll had sold to Russell 500 bales of cotton, to be delivered on its arrival from New Orleans at New York by the first day of June to be paid for on delivery, and only eleven bales had arrived at New York, which Nicoll refused to deliver, Russell having sued on the contract alleging failure to deliver, it was held that the contract was executory; that it was entire and Nicoll was not obliged to deliver the eleven bales, the residue not having arrived, and though the time of delivery was named the transfer depended upon the arrival of the cotton, an event not absolutely within the control of either party, and might never happen, and that if the cotton should not arrive by the first of June the plaintiffs were not bound to receive and pay for it, nor the defendants to deliver it.

The principle of that decision is applicable to this agreement in respect to the condition of delivery.

For the defect in this declaration in omitting to allege the possibility of performance according to the terms of

the agreement, the plaintiff in error insists that the demurrers should not have been sustained, and we think he is right.

The judgment is reversed and this cause is remanded with direction that the judgment sustaining the several demurrers be vacated, that said demurrers be overruled, and that the plaintiff be permitted to amend his declaration within such time as may be named, and in default thereof that judgment be given for defendant.

MILES PRICE, APPELLANT, VS. M. W. DREW, APPELLEE.

1. A. and B. ship a cargo of yellow pine-piles to New York City on their joint account, upon the agreement that they would bear equally the expenses thereof, and share equally in the profits and proceeds of the shipment. A. advances to B. on account of the shipment $284, and settles a loss of $1,204 incurred in the venture. The parties are partners, and in the absence of any settlement or balance struck, or covenant to account by the partners of promise express or implied, the remedy of A. is in equity and not at law.
2. Where there is a demurrer to a plea restricted to one count in a declaration, and there are issues of fact upon other counts in the declaration, the court in giving judgment upon the demurrer, looks only to that part of the record upon which it arises, and if both the count and plea are bad in law, the judgment upon the demurrer is against the count.
3. A demurrer to a plea to the whole declaration should be sustained if there are any good counts in the declaration to which it sets up no answer in law.
4. That the matters developed in the trial are matters cognizable in equity and not at law, is a good ground to set aside the findings of a refere e.
5. The limitation to an action on a contract obligation or liability not founded upon an instrument of writing, such as is set up in the *indebitatus assumpsit* counts for money paid, for money found to be due, and for money payable, in this case is three years.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

C. P. Cooper for Appellant.

Fleming & Daniel for Appellee.

The first questions in their order for decision by this court are raised by the demurrer of M. W. Drew, who was the plaintiff in the court below, to the first and third pleas of Miles Price, who was the defendant in the lower court.

The declaration, as appears by the record, contains four counts.

The first count sets up a joint shipment of a cargo of piles by Drew & Price, in which they were to share in the profits and losses, and certain advances made by Drew to Price on account of the shipment, and that Drew paid the losses on the shipment: that Price is indebted to Drew for the advances made, and one half of the losses paid by Drew.

The scond count is for money paid by plaintiff for defendant at his request.

The third count is for money loaned by plaintiff to defendant, and the fourth count is for money found to be due from defendant to plaintiff on accounts stated.

Defendant's *first* plea is: "That the court ought not to have or take further cognizance of the action aforesaid, because he says that the said supposed cause of action, as set forth in the first count of plaintiff's declaration, is out of the jurisdiction of this court, and is only cognizable, if at all, by a Court of Equity, which has exclusive jurisdiction of matters of partnership."

This plea is demurred to on the ground—first, that it does not tender an issue of fact.

We do not deem it necessary to cite authorities to this court to sustain the elementary principles that all pleas

must set up matters of fact, or by a travers tender an issue of fact to the opposite party.

As to whether the cause of action as set up in plaintiff's first count is in or out of the jurisdiction of this court is matter of law, and should be raised by demurrer and not by plea, unless the plea itself sets up facts which show that the court has no jurisdiction, which this plea does not.

Appellant in his brief says that the question of jurisdiction may be raised either by plea or demurrer. That is true with this qualification, that it must depend upon the circumstances of the case. If the declaration on its face shows that the court is without jurisdiction, as claimed by appellant, then the question, under the rules of pleading, must, like all other matters of law, be raised by demurrer, and a plea is only necessary and proper where the *facts* must be stated *dehors* the declaration, to show that the court is without jurisdiction. And the authorities cited by appellant do not vary this rule.

The plea presents no fact upon which issue can be taken, but sets up a proposition of law that equity has exclusive jurisdiction in matters of partnership.

We are aware, however, of the rule that the demurrer to the plea reaches back to the declaration, and that the court will give judgment against the party who committed the first error.

We will, therefore, for the argument, treat the plea as a demurrer to the declaration, and examine the latter to ascertain whether it sets up a cause of action.

It will be observed that the plea now under consideration goes to the whole action, and not to any particular count of the declaration, using this language, "this court ought not to have or take further cognizance of the action aforesaid," alleging as a reason, "that the said supposed cause of action, as set forth in the first count of plaintiff's declaration is out of the jurisdiction of the court."

It has been repeatedly held by this court that if the demurrer be to the whole declaration, and it is found to contain one good count, the judgment on the demurrer must be for the plaintiff. McKay vs. Frieble, 8 Fla., 21; Barbee vs. Jacksonville & A. Plank R. Co., 6 Fla., 262.

The second, third and fourth counts of the declaration in this cause are of the common counts, in the form laid down by the practice act, Chapter 1096, and as the damages laid are within the jurisdiction of the court there can be no question that the said second, third and fourth counts of the declaration are good, and the plea, which, if considered at all, can only be considered (as we have shown) as demurrer, under the authorities of this court above cited, was properly overruled. This, we think, effectually disposes of this plea.

Let us see, however, whether the first count of the declaration is good.

This sets up a shipment of piles by plaintiff and defendant on joint account, under an agreement to bear equally the expenses and share equally in the profits and losses, that the plaintiff advanced to defendant $248 on account of the shipment, and that the expenses exceeded the amount of sales $1,204, for which amount a loss was sustained, and which plaintiff paid, that defendant became and was indebted to plaintiff for one-half of such loss, besides the said amount advanced.

We are well aware of, and do not pretend to controvert the rule, that it is peculiarly the province of equity to deal with matters of general partnership, and the reasons of the rule are that courts of law are not competent to investigate and settle between partners long partnership accounts involving numerous transactions as between themselves and third parties.

But it is equally well settled that there are cases where one partner can sue another at law.

In the case at bar, if the declaration shows a partnership at all, it is merely a partnership *pro hac vice*, which terminated with the one venture in which the parties were engaged, to-wit, the shipment of a cargo of piles. There is no long account stated, but simply a statement of a loss sustained on a single transaction paid by Drew, and the agreement of Price to share the same, besides the advances made by Drew to Price.

"Where persons are partners in a single transaction, one of them may, in an action of assumpsit for money paid to his use, enforce from the other contribution to a debt which he may have discharged, but to which they were jointly liable." Gow on Partnership, §79, 3d Ed.

"It has been usual, however, to lay it down as a general rule that contribution may be obtained in an action of assumpsit by one partner against another for money laid out to the defendant's use. This position has been questioned by one learned writer, and has since been entirely abandoned by another, who in the last edition of his book has confined it to cases of partnership in particular transactions." Collyer on Partnership, 3d Am. Ed., 282.

The rule is thus laid down as between partners to a single transaction, which is precisely this case.

In Parsons on Partnership, (3d Ed.) §384, we find that partnerships formed for a single adventure or enterprise terminate when that enterprise is brought to a close, for, as stated, the articles of agreement which limit the partnership to that adventure imply that it ceases when that ceases.

It will be observed by examination of the authorities that the objection to a suit at law between partners for contribution is that it is impossible, *during the continuance*

of the partnership, without taking a general account, to say that any one partner so called upon to advance or pay money is on the whole a creditor of the firm to such an amount. 1 Story Equity Jur., (12th Ed.) Sec. 664; Story on Partnership, 278.

The court, in the declaration now under consideration, shows that the adventure in which the plaintiff and defendant had embarked had long since terminated when the suit was brought, and that plaintiff had paid the loss; see also the date of account of sales rendered by Fairchild and attached to the declaration.

Therefore, as the quasi partnership between plaintiff and defendant had long since ceased, that relation did not exist when the suit was commenced.

When a partnership is dissolved, and upon settlement a balance is found due to one of the partners, assumpsit will be for the amount. Pope vs. Randolph, 13 Ala., 214.

The general rule is that a partner may sue at law a partner on a promise to pay a balance which has been struck and agreed upon.

The reason for this is clear and certain; it is that all the reasons for refusing this remedy at law disappear from such a case. For the first place, as to a settled balance, they are no longer partners. If the settlement has closed their concerns, or has followed the dissolution of the partnership, they are no longer partners at all. Story on Partnership, §278.

We do not think it necessary to set up in the count the express agreement of Price to pay Drew his share of the loss, further than the agreement to share the loss.

It is held in Massachusetts that a promise to pay is not necessary, and the suit will be maintained, although the accounts are not closed between the partners. Williams vs. Hernshaw, 11 Pick., 81.

The agreement between partners as to the amount due from one to the other on final settlement, or a balance struck, raises an implied promise to pay it, and an action is maintainable thereon. Rackstraw vs. Imber Holt, N. P., 368; Hunley vs. Loper, 8 B. & C., 16; Wray vs. Milestone, M. & W., 21; Dickison vs. Granger, 18 Pick., 327; Pope vs. Randolph, 13 Ala., 214; Spear vs. Newell, 13 Vt., 288; Ross vs. Cornell, 45 Cal., 133.

And there are numerous authorities sustaining the doctrine that the balance for which suit may be brought need not be a final or general balance of all the partnership accounts, but that it is sufficient if it embraces a settlement of particular matters. Coffee vs. Brian, 3 Bingham, 54 Brown vs. Tapscott, 6 M. & W., 119; Brinley vs. Cripps, 7 C. & P., 709; Carr vs. Smith, 5 Q. B., 128; Gibson vs. Moore, 6 N. H., 547; Clark vs. Dibble, 16 Wend., 603; Byrd vs. Fox, 8 Mo., 574.

In the case at bar the first count of the declaration shows a certain sum due from Drew to Price, under their agreement, involving but one transaction, and the reasons for the intervention of a Court of Equity in the settlement of long accounts between partners does not exist. Certainly this count does not show any such complicated and unsettled accounts, which counsel for the plaintiff in error in his brief states requires adjudication by a Court of Equity, nor does the bill of particulars show the same. As to the bill of particulars attached to the defendant's offset, the principal part of this has no connection whatever with the partnership.

We think we have shown that the first count does not set up such facts as show that the court is without jurisdiction as to the matters therein set forth.

As we have before said, certainly the second, third and fourth counts are good, and the plea which applies to the whole declaration was properly overruled.

We will defer what further we have to say on the question of the partnership until we come to discuss the exceptions of the defendant to the master's report upon the case made by the testimony, and will now take up the next question which presents itself for consideration which is raised by plaintiff's demurrer to defendant's third plea, which plea sets up the defence of the statute of limitations, alleging that the cause of action did not accrue within two years before this suit.

Was this action barred by the lapse of two years? We confess that we are unable to appreciate the logic of the argument of counsel for the plaintiff in error on this point.

It appears to us that the proper test of the question is to apply the case, as set up by the declaration, to that class of claims which is embraced in the latter part of Section 10 of the Act of Limitations, which are barred after the expiration of two years. Certainly neither the "first" nor "second" sub-division has any applicability to the case.

As to the "third" sub-division, it is a very grave question as to whether the bar of *four* years or *two* years applies; and the longer term is thought by many lawyers to apply to the whole of the third sub-division, connected, as it is, by the conjunction "and" to the last clause.

But suppose, for the sake of the argument, it is held that an action on an open account for goods, wares, and merchandise, sold and delivered, is barred at the expiration of two years, is there any count in the declaration setting up such a claim? A glance at the declaration is sufficient to answer this question in the negative. When, as we have seen, as this plea goes to the whole declaration, if it contains a single count to which the plea did not set up a defence, the plea was properly overruled. And to follow counsel for the plaintiff in error in all the refinement of his argument it is impossible to arrive at the conclusion that

the declaration in any way, shape or form sets up "an action on an open account for goods, wares and merchandise sold and delivered."

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an action of assumpsit brought by Drew against Price. The declaration contained several counts. The last four were for money payable by the defendant to the plaintiff, for money paid by the plaintiff for the defendant at his request, for money paid by the plaintiff to the defendant, and for money found to be due upon an account stated. To these counts in the declaration the plea of never was indebted was interposed, and there was issue thereon. The defendant also plead the statute of limitations of two years, and a special plea of set-off of an amount alleged to be equal to the plaintiff's claim and due him by plaintiff for the purchase-money of piles and timber furnished by him to plaintiff at his request. To this plea plaintiff replied that he never was indebted; and to the plea of the statute of limitation he interposed a demurrer, which was sustained. The first count in the declaration was as follows:

"For that the plaintiff and defendant shipped a cargo of yellow pine piles to New York City on their joint account upon the agreement that they would bear equally the expenses thereof and share equally in the profits, proceeds of said shipment of piles.

"That the plaintiff advanced to the defendant on account of such shipment the sum of two hundred and eighty-four dollars; that the expenses on said shipment of piles exceeded the amount of the sale thereof by the sum of one thousand two hundred and four dollars, for which amount a loss was sustained on said shipment of piles which the plaintiff paid, and the defendant thereupon became, and

was, and is, liable and indebted to the plaintiff for one-half of said loss besides the amount advanced to him as aforesaid, and no part of the same has been paid."

To this count the defendant filed the following plea:

"That this court ought not to have or take further cognizance of the action aforesaid, because he says that the said supposed cause of action, as set forth in the first count of plaintiff's declaration, is out of the jurisdiction of this court, and is only cognizable, if at all, in a court of equity, which has exclusive jurisdiction in a matter of partnership."

In one branch of the argument by the appellee and plaintiff it is insisted that the plea is to the whole action. The commencement here is not applicable to a plea to a distinct count to the declaration, but the body of the plea, looking to the issues of law and fact made upon the other counts of the declaration, shows that it is applicable to the first count alone. It is therefore to be considered in the light of a plea going to the first count only, and to no other. To this plea the plaintiff interposed a demurrer, the grounds of which were that it did not tender an issue of fact; that it did not set up facts which show that a partnership existed.

This demurrer was sustained. This action is one of the errors here assigned. The questions of law arising upon this demurrer are the most important, are really the controlling questions in this case, and we therefore consider them first. This demurrer reaches the first count in the declaration, and if it be that it does not set up a cause of action for which assumpsit can be maintained, it is immaterial how defective the plea is. Before discussing the matter of the first count in the declaration we will say, however, that the usual and proper method of raising the question here raised is by demurrer. By way of plea to

simply set up facts stated in the declaration and deny their sufficiency in law, whetеher such plea be in form in abatement to the jurisdiction or in bar of the action, is not correct. Again, as to the matter of this plea, or rather the matter attempted to be set up by it, that this count was for the recovery of a sum of money arising out of partnership relations and by the plaintiff alleged to be due and that there had been no settlement of accounts by the partners or final balance struck, or expressed or implied promise to pay any such alleged balance, it has been held that this is not the subject of a plea in abatement to the jurisdiction, but rather of a plea in bar to the action. (2 Harris and Gill, 135; Evans on Pldg., 16.) Such cases, in the opinion of that court, are not merely out of the jurisdiction of a particular court, but are without remedy by the course of the common law, and present a case where there is no legal cause of action in the same manner as if there was a general release of right of action before suit brought. This is the view of the court in Maryland in the case cited. See, however, upon this subject the remarks of Lord Thurlow in Nabob of the Carnatic vs. East India Company, 1 Ves. Jr., 388.

But however this may be, if the first count is not good then the judgment upon this demurrer must have been against it. This count sets up, first, that the plaintiff and defendant shipped a cargo of yellow pine piles to New York City on their joint account upon the agreement that they would bear equally the expenses thereof and share equally in the profits and proceeds. As to this shipment they were therefore partners. The plaintiff then alleges that he advanced to the defendant on account of the shipment two hundred and eighty-four dollars; that the expenses incurred exceeded the proceeds of the sales one thousand two hundred and four dollars; that for that

amount of loss was sustained; that the plaintiff paid it, and that the defendant thereupon became liable and indebted, &c.

Assumpsit is based upon a promise, express or implied. There is here no allegation of any settlement of the accounts connected with the shipment by the partners, no allegation of a final balance struck between them, and no allegation from which any promise, express or implied, by the defendant to pay the *particular sums* claimed as due arises. The claim is also for one-half of two sums due, one of two hundred and eighty-four dollars advanced to defendant on account of the shipment on partnership, and the other for a balance claimed to be due as a balance, ascertained by plaintiff to be one-half of the difference between the expenses and proceeds of sales. Can the plaintiff maintain an action at law for these sums? We think not. This being a partnership, and there having been no settlement by the partners and no allegation of a balance struck, there is nothing to raise a promise, express or implied, by one partner to pay to the other any particular sum. An adjustment of the accounts, either as to advances or profits and losses, by one partner cannot be held to be an adjustment by the other in the absence of authority from the other, and this is true in the very nature of things, whether the partnership be for a single shipment or "transaction," or a partnership of a general character. Again, under this count it cannot be said that either partner is the creditor of the other. The accounts of each are with the partnership, each of the partners compose it, and neither of them can at law sue, because such a suit would be equivalent to suing himself. Until these accounts are adjusted, what one partner may owe the firm is not a debt due to the copartner, nor is the indebtedness of the firm to one of the members a debt due from the other members to him. See the remarks of

Lord Cottenham in Richardson vs. The Bank of England, 4 My. & Cr., 165.

What say the books on this subject? In 1 Chitty's Pleading, (11th Ed.) 45, where, with 2 Chitty, 213, we find the most complete collection of cases on the subject, it is said: "In the case of a partnership, whether it be a general or a particular partnership, one partner cannot at law recover his share of money received by the other on account of the firm, unless on a final balance of all accounts a particular sum be found due to one partner which the other expressly promises to pay, or unless there be an express covenant to account." The earlier cases in 2 T. R., 478; 2 Bing., 170; 3 Bing., 55; 6 B. & C., 149; Holt's N. P. Cases, 368, are cited to the text, and upon examination some of them sustained the doctrine as announced, and others do not. The case in Holt holds that upon a settlement and balance found an implied promise arises. The case in 2 Bingham, however, repudiates this doctrine, expressly referring to the case in Holt as a *nisi prius* case, and holds that an express promise is necessary. (P. A., 6 B. & C., 79.) The case in 2 Tenn. R. inclines to that view. In the case in 6 B. & C. there was no account settled. The later rule in England, and which is now treated as the settled doctrine in that country, and in many if not in most of the States of the Union, is that if partners finally balance all their accounts and a certain sum be found to be due to one of them thereon, the partner against whom the balance is struck may be sued at law to recover the amount, without there having been any express promise on his part to pay the same. (Wray vs. Milestone, 5 Ex., 21; 1 Bin., 191; 71 Penn. State, 180; 50 Mo., 121; 43 Conn., 66.) In New York and Illinois an express promise seems to be required. (16 John., 322; 17 John., 84; 1 Wend., 534; 2 Scam., 498; 11 Ill., 154; 60 Ill., 561.) In Massachusetts, contrary

to the rule in any other State, so far as we have, after careful examination, been able to ascertain, it is held that assumpsit will lie to recover a final balance of a partnership account, and that this extends to all cases in which the rendition of the judgment will be an entire termination of the partnership transactions, so that no further cause of action can grow out of them." In that State it is not deemed necessary that there should have been a settlement by the partners or final balance struck. (11 Pick., 81; 111 Mass., 249.) It is admitted, however, that this is contrary to the rule at common law and the rule prevailing in other States. A strong reason for asserting this rule is that there were no Courts of Equity in that State, and we presume this had great weight in establishing the doctrine. In this State we have Courts of Equity, and we must follow the rule as announced by the English and American courts.

But it is said that the present case is that of a particular adventure, and not of a general partnership for commercial purposes. This is true, but we do not think as applicable to this case the rule is varied.

The case Beville, *et al.*, vs. Hammond, 6 Bar. & Cress., 79, was a case where two persons undertook to procure a cargo for a vessel for a certain commission, and the rule was applied to it, Abbott, C. J., remarking: "It is a general rule that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law. These parties have never settled any account between themselves, and the only ground on which this case is distinguishable from former decisions is that all the moneys have been received and paid by one partner. That certainly makes an account between them less necessary, but if we therefore held this action to be maintainable, I think we should be breaking down a general rule and introducing nice distinctions which it is much better to

avoid." The case of Leidy vs. Messinger, 71 Penn. State, they, as partners, purchased for $1.000 one share of the stock of an unincorporated oil company. Messinger paid $500 in cash and Leidy gave his note for $500, which was passed in payment for the purchase-money of the land of the company, placed by the vendor in the hands of counsel for collection, and was unpaid. The company became insolvent, and it was held that Messinger in assumpsit could not recover from Leidy the one-half of cash paid by him, and that Leidy's liability to Messinger resulted from the partnership relation, and Messinger could not recover until there was a settlement of their accounts and balance struck. The case of Sprout vs. Crowley, 30 Wis., 187, was the case of a "joint adventure." The court remarked that: "In the absence of fraud or express agreement, or other circumstances rendering the case exceptional, one partner has no claim against his copartner individually on account of partnership transactions until a final settlement of the partnership affairs, although such settlement would show a balance in favor of the former, and until such final settlement the general rule is that the firm and not the individual is the debtor."

But it is insisted that this is the case of a partnership in a "single transaction," and that one of the partners may, in an action of assumpsit for money paid to his use, enforce from the other contribution towards a debt which he may have discharged but to which they were jointly liable.

This is the text of Gow on Partnership, §79. This writer, in support of this proposition, cites 8 T. R., 186, and 2 Bing., 132. The case in 8 T. R. was that of a judgment in tort against two defendants where there was a levy of the whole damages on one. This one sued for a contribution from the other. Lord Kenyon said that he had never before heard of such an action where the judgment was for

a tort, and that it would be otherwise if the judgment had been in assumpsit. No one, certainly, can see any partnership in a single transaction or otherwise in this case. There is no contribution in tort. Each tort feasor is liable for the whole without right of contribution. Unquestionably where there is a judgment in assumpsit against two and one pays the entire amount, he is entitled to contribution. This is all that is here said or decided. The case in 2 Bing., 132, was not a case of an action between partners. The action was by Evans against Yeatherd. The defence was that Yeatherd was in partnership with Follett, and that the articles sold were delivered to him on the joint account of Yeatherd and Follett, and that they had been paid for by remitting a debt due from the vendor, who brought the action to the firm of Y. & F. The court held that because, either at law or in equity, Yeatherd would be entitled to contribution from Follett, he, F., was an interested witness. I cannot see how this case sustains the text, so far as it concerns partners in a joint adventure, if that is what it means. The other case cited from 2 Black., 917, I have not been able to examine.

The present case, however, is not the one stated in the text where contribution is sought for a joint debt paid by one of two joint debtors who may be partners with reference to that debt alone.

In speaking of the cases cited by Gow in the second edition of his work to sustain his proposition, there somewhat modified, and of others of like character, Parsons, in his work on Partnership, says: "These cases seem to be very far from establishing the proposition for which they are cited, which is that through an action of assumpsit for money paid to his use one partner may enforce contribution from the other in a case where they were partners in a single transaction. In some of them are to be found *dicta* of

Judges asserting the general right of contribution between joint defendants." (This is the case in 8 T. R., as we have seen.) "In some contribution is actually enforced, but between persons who are not partners but simply joint contractors or otherwise jointly connected, while in the others (2 Bing., 132.) the question before the court is the competency of a witness, his competency depending upon his liability to contribute, *either in law or in equity*, to a demand which his testimony establishes. The distinction, if any, which these cases suggest, is one between persons who are simply joint contractors and between those who hold to each other the closer relation of partners; that is, it is between parties who are partners and those who are not, and not between different kinds of partners." See as to this difference, 5 Gray, 463, 468.

There is another class of cases which may be called the "single item" cases. (5 Wend., 274; 1 Stark., 78; 16 Wend., 603; 4 Burr., 283; 6 N. H., 551. See citations in Parsons on Part., 3d Ed., note, page 309.) These are principally cases where there has been some special transaction in reference to the partnership in which a balance has been admitted to be due by one partner to the other and a promise to pay, before any final winding up of the partnership. 16 Wend., 601; 4 Burr., 281; 6 N. H., 547.

The case of Robson vs. Curtis, which is usually cited in this connection, and upon which most of the American cases are founded, is rather in conflict with the cases just mentioned. In that case A., receiving a bill of exchange in payment for part of a lot of cattle jointly purchased by himself and B., endorsed the bill to B., B. endorses it over, and the bill being dishonored, *B. promised* to pay A. half of the amount if he would take it up. A. paid it, brought his action and was non-suited, because a part of the cattle jointly purchased remained over. But however this may

be, the case here is not one which, in any sense, or within the principles established by any of these cases, can be called a single item case. The count in the declaration claims a balance on account of advances to the partnership by the plaintiff for his partner, and a balance due for losses paid by him in the matter of the joint venture, as shown by an account of the sales and expenses.

Our conclusion, upon an examination of the facts set up in this count, is that it fails to set up any legal cause of action in that no settlement by the parties is alleged. There is no promise, express or implied, to pay any sum. What is alleged shows that the plaintiff, certainly to the extent of the losses, is a creditor of the partnership and not of his partner. The advances made being on account of the shipment would seem to be an advance by the partnership through him to his co-partner, and as to this, therefore, the defendant is the debtor to the partnership and not of the plaintiff. It is said that the partnership is dissolved. That may be true in a general sense, but the rights of the partners still exist for the purposes of adjusting their accounts, and they must seek the forum appropriate to such relief.

The demurrer to the plea to the first count in the declaration should have been overruled.

The next question here raised is that arising upon the demurrer to the plea of the statute of limitations of two years. We think this not a good plea to the indebitatus count in the declaration for money paid, &c., for, so far as it is concerned, the action is upon a contract, obligation or liability, not founded upon an instrument of writing, and the limitation in such case is three years. The demurrer to this plea should therefore have been sustained.

Without going into an elaborate statement of the facts appearing upon the testimony, we will simply state that after careful examination we find merit in the case, and

that Price should in equity settle this matter upon the basis of partnership dealings, but we do not find a case from which a promise, express or implied, arises to pay any balance, or to pay any money, upon which an action of assumpsit will lie. As to the statute of limitations applicable to the case made in the first count of this declaration, we will say that it is neither an action for goods, wares and merchandise, nor for any article charged in a store account, within the meaning of the statute. What the limitation is to his equitable right to have an account of the matters of the partnership and decree for any balance to be found due, is a question which a court of equity, not this court, must determine. As to the present action we think it proper to say, however, for it relates to the nature of this action viewed in reference to the statute of limitations, that it is, in our opinion, clearly an action within the meaning of the first clause of the Sixteenth Section of the Statute of Limitations, Chapter 1869, Laws.

Judgment reversed, and case remanded with directions to set aside the finding, and for further proceedings conformable to law and consistent with this opinion.

JAMES R. MASSEY ET AL., APPELLANTS, VS. S. B. HUBBARD ET ALS., APPELLEES.

1. At a sale on execution the purchaser takes only the interest of the defendant in execution.
2. When a purchaser of land receives a deed and enters into possession and continues in the actual occupancy, but does not record his deed, such notorious occupancy constitutes sufficient constructive notice to "subsequent purchasers or creditors" to protect the holder of the deed against the creditors of the grantor.

Appeal from the Circuit Court for Alachua county.

P. H. Young was the Referee who heard the case.

The other facts of the case are stated in the opinion.

Thrasher & Hampton for Appellants.

Thomas F. King for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

In January, 1880, Middleton was the owner of a lot in Waldo, Alachua county, his title deed being upon record. On the 22d January Middleton sold and conveyed the lot to W. T. Craig by deed duly executed, but the deed was not recorded until the 24th June, 1880. On the 3d of May, 1880, appellees recovered judgments against Middleton in the Circuit Court for Alachua county, upon which judgments executions were issued and levied upon the lot as the property of Middleton, and on the 5th July it was sold by the sheriff and deed executed to the plaintiffs in execution. At the time of the purchase by Craig from Middleton in January he took actual possession, and has had actual possession and occupied the property until this suit was brought in ejectment by the purchasers at the sheriff's sale.

The cause was tried before a referee upon the foregoing agreed state of facts, and judgment was rendered in favor of plaintiffs against appellants.

The ruling of the referee that the lien of the judgment attached to the property as against the prior unrecorded deed, and the denial of a motion for a new trial, are assigned for error.

The statute says that every judgment shall create a lien and be binding upon the real estate of the defendant. Act February 12, 1824.

It was held in Holland vs. The State, 15 Fla., 455, 519, that a purchaser at an execution sale takes only the right,

title and interest which the debtor had, subject to equities existing when the judgment was recovered. "Caveat emptor is the rule. He takes only the interest of the defendant." This is also the rule in Daniel vs. Hollingshead, 16 Ga., 190. In Osterman vs. Baldwin, 6 Wall., 122, the court say: "A purchaser at a sheriff's sale buys precisely the interest which the debtor had in the property sold, and takes subject to all outstanding equities."

There is no pretence here that the sale of Middleton to Craig and the execution of the deed were fraudulent, and it appears that Craig went into immediate actual possession under his deed long before the recovery of the judgment, and still is in possession. When the judgment was recovered, Middleton had no title or interest in the lot.

Counsel for defendant in error refer to section 4, act of November 15, 1828, (McClellan's Digest, 215,) as follows: "No conveyance, transfer or mortgage of real property, or of any interest therein, shall be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same shall be recorded," &c.

There has been a vast amount of judicial discussion in the various States upon the question arising under the statutes whether creditors and subsequent purchasers stand upon similar ground as respects grantees and mortgagees whose deeds have not been recorded. In Tennessee, (Mart. & Yerger, 385,) Georgia, (25 Ga., 687; 13 Ga., 443,) Virginia, (4 Rand., 208,) North Carolina, (1 Dev. Eq., 470,) and in some other States it has been held that a creditor who obtains a lien by judgment or by attachment is not affected by notice, actual or constructive, received before or after the lien attached, of a prior unrecorded deed or mortgage. The whole question depends upon the terms of the statutes of the several States. In Tennessee, for instance, by an act of 1819

it was provided that deeds should take effect and operate only from the time of registration, and it was held that no evidence of notice *dehors* the statute could be received, because the notice prescribed is the registration; and the Legislature having made no exception, the court could make none. (Mart. & Yerg., 392.) In Georgia, by act of 1827, all deeds of mortgage upon real property shall be recorded in the clerk's office within three months from their date, and upon failure to record any mortgage within the time required, all judgments obtained before the foreclosure of the mortgage, and also any mortgage executed after the same, and duly recorded, shall take lien on the mortgaged property in preference to the first mortgage. In Virginia (as we find by reading the case in 4th Randolph, 211,) the words "for a valuable consideration and without notice" are referable, by the plain terms of the statute in force in 1826, to subsequent purchasers only, and had no effect upon the liens of creditors, who are therefore not postponed to a prior unrecorded deed or mortgage, even though they had notice thereof. The court says that by the terms of the statute all deeds of trust and mortgages unrecorded shall be void as to creditors, absolutely and without qualification. In Alabama the statute is like that of this State in respect to the recording of mortgages and deeds of trust to secure debts. "If any such conveyance be made of real estate the same shall be recorded * * within sixty days, or the same shall be void against creditors or subsequent purchasers without notice." (Clay's Dig., 256, §5.) The only difference is that the words "for a valuable consideration" are not inserted in the Alabama statute after the word "purchasers." The court in that State, in considering this statute, in Smith vs. Zurcher, 9 Ala., 208, where the property in controversy was a slave, (the statute using the same words as respects mortgages of real and personal property)

said: "If the act in question be considered a statute of frauds instead of an act to provide for the registration of deeds and conveyances, a notice of its existence, if not recorded, would be unavailing to secure to the mortgagee the benefit of his security against creditors and purchasers, if the statute itself did not declare that the deed, for the omission to record it within the time prescribed, should only make it void as to persons coming within these classes who had not had notice." In that case the property was delivered to the mortgagee at the time the mortgage was executed, and the court say: "The plaintiff retained possession of the slave when the *fi. fa.* was levied on her, consequently there was a state of things which the law regards as notice in fact to the creditor, and which, we have seen, in a substitute for registration." See also Daniel vs. Sorrells, 9 Ala., 436.

The statute of New Jersey enacts that "every deed or conveyance of or for any lands, to any purchaser of the same, shall be void and of no effect against a subsequent judgment creditor or a *bona fide* purchaser or mortgagee for a valuable consideration, not having notice thereof, unless such deed or conveyance shall be acknowledged or proved and recorded within fifteen days." (Stat. of N. J., 1847, 643, §18.) In the construction of this statute it was held that the want of notice is as essential to the protection of a judgment creditor as of a purchaser or mortgagee, and such, it may be fairly presumed, was the intention of the Legislature; otherwise persons with a full knowledge of an honest transfer of real estate might trust the grantor, and then, obtaining judgment, defeat the *bona fide* purchaser, who, from ignorance or negligence, had omitted to have his conveyance recorded. (Garwood vs. Garwood, 4 Halst., 193.) The statute of New Jersey, it will be observed, is substantially like our own.

In Missouri it was formerly held that a judgment lien prevailed over a former unrecorded mortgage or other conveyance ; (8 Mo., 479; 9 Mo., 722; 11 Mo., 77;) but in those cases no notice appears to have been given to the creditor or the purchaser under execution until after the lien attached. Later, however, it was held that the mortgage lien would prevail without regard to notice, if the mortgage was recorded befort sale on execution. 14 Mo., 170; 20 Mo., 133; 44 Mo., 205; 49 Mo., 244.

It is held in Massachusetts, under the recording act, that a creditor knowing of a conveyance of land made by his debtor for a valuable consideration, which is not registered, cannot, by an attachment and levy upon the land, obtain a title against the grantee. The case of a second purchaser and of an attaching creditor are considered the same with respect to the effect of notice. (4 Mass., 641; 6 Mass., 487; 10 Mass., 60.) In Priest vs. Rice, 1 Pick., 164, Parker, C. J., says that "the reason is the same in both cases, for if a creditor, whose debt is due, will stand by and suffer his debtor to sell his land and receive the value of it from one who knows not of his claim or of his intention to bring an action upon it and will afterwards attach the same land. there is a constructive fraud upon the purchaser which ought not to prejudice his title. The execution and delivery of the deed completes the transfer from the grantor to the grantee; the registry is to give notice that others may not be prejudiced. Actual notice proved is, to the person affected by it, as useful and ought to be attended with the same consequences as public notice in the registry; an implied notice arising from possession under the deed is as effectual as actual notice." We refer, for a collection of the American authorities upon the whole subject, to leading cases in equity by White and Tudor, Am. Ed., 1877, Vol. 2, pt. 1, pp. 93, 99, notes to Bassett vs. Nosworthy; 16 Fla., 781.

In the light of the construction given by the courts in Alabama, New Jersey and other States, where their statutes are substantially like that of Florida, which is in accordance with our view of the clear intent of our statute, we must hold that creditors and subsequent purchasers stand upon the same footing in respect to notice of a prior conveyance not recorded.

As before remarked, there is no charge of fraud and no attempt to show that the conveyance was not in good faith. The case stands upon the effect of the statute alone.

Craig immediatey went into actual possession after his purchase, and has remained in the occupancy of the premises. This is constructive notice of ownership or of an interest, and the recording of a deed is but constructive notice. Any like notice is sufficient to put creditors and purchasers on inquiry. 64 N. Y 76; 3 Kern., 180; 2 Barb. Ch., 555; 2 Paige, 300; 2 Mass., 508; 4 N. H., 262; 6 Wend., 213; 54 N. Y., 640; 1 Pick., 164; 9 Ala., 208, 443.

The judgment is reversed and a new trial awarded.

HYER'S EXECUTORS, PLAINTIFFS AND RESPONDENTS, VS. CARO'S EXECUTRIX, DEFENDANT AND APPELLANT.

1. The Clerk in taxing costs in a cause to be entered in judgment is required to tax only such items of costs and disbursements as are duly proved by the party demanding the same, or may appear in the records and files of the court, and it is not an error or misprision of the Clerk to omit to tax and enter in judgment items not so demanded and proved.
2. In such case, after judgment entered and the term passed, the judgment cannot be opened and amended by inserting and including other costs to which the party may have been entitled, if they had been demanded and duly proven before judgment.

3. Under the Code it was necessary for the party demanding the taxation of costs and disbursements to serve and file an itemized statement thereof.

This is an original motion in this court by the appellant. The facts are stated in the opinion.

W. A. Blount and *J. E. Yonge* for the motion.

E. A. Perry and *Geo. P. Raney, contra.*

THE CHIEF-JUSTICE delivered the opinion of the court.

In this case a final judgment was entered by this court reversing the decree of the Circuit Court in equity with costs, and formal judgment was entered for a sum therein named against appellees. This judgment was entered at June term, 1879. 17 Fla., 332.

In January, 1881, appellant entered a motion that the clerk be directed to tax and insert in the judgment certain costs allowed by the "Code" which had not been included in the judgment entered. This motion was afterward called to the attention of the court and submitted upon briefs by the respective counsel in June term, 1881. The costs as taxed by the clerk were clerk's fees only. The costs now claimed are the costs allowed under the Code, and $45 for the transcript of the record, in addition to the fees of the clerk as taxed and inserted in the judgment.

It is objected that it is now too late to open and correct the judgment, no bill of costs and disbursements having been presented until two years after the entry of judgment.

It is claimed in behalf of the motion that the omission of these items was a misprision of the clerk, and therefore the record may be corrected according to the truth of the proceedings.

"The court may amend the record of nisi prius at any time for a defect arising from the misprision of the clerk."

Writ of Error to Circuit Court for Alachua county.

The facts of the case are stated in the opinion.

E. K. Foster for Motion.

B. H. Thrasher, contra.

THE CHIEF-JUSTICE delivered the opinion of the court.

Motion by Plaintiffs in Error to docket this cause for trial, and motion by Defendant in Error to dismiss, because no record of the jugdment and proceedings has been filed by Plaintiffs in error, and no assignment of errors filed by them. No cause is shown for neglecting to file assignment of errors.

The motion that this cause be dismissed from this court for the reasons stated in the motion of Defendant in Error is granted. The paper on file purporting to be a record does not show what judgment was given by the court below, and for this reason, also, it should be dismissed. Neither does the certificate of the clerk show that this is a copy of the record, as required by the rules.

Dismissed.

THE MUSCOGEE LUMBER COMPANY, APPELLANT, VS. WILLIAM K. HYER, ET AL., TRUSTEES, APPELLEES.

1. The English rule, that a trustee, executor or administrator is not entitled to compensation for his care and trouble, unless an allowance is made in the instrument creating the trust, has been qualified in this country, and the converse principle is recognized and generally established.

2. The laws of this State allows to guardians, executors and administrators a compensation for their services, and in analogy, upon equitable principles, a reasonable compensation should be allowed to trustees for their services, care and responsibility incident to their position.

nished or proved to the clerk upon the taxation of the costs during the term when judgment was rendered. The record or files do not show that any costs or disbursements were omitted of which he had any means of ascertaining the amount. There was no receipt or endorsement upon the transcript of the record showing the amount of the charge for it by the Circuit Court, nor, indeed, that it had been paid for either party.

There was, therefore, no misprision, and there is nothing to amend by.

Section 256 of the Code provided that the clerk should insert in the entry of judgment, on application of the prevailing party, upon notice to the opposite party, the sum of allowances for costs, as provided by the code, and the disbursements stated in detail verified by affidavit.

All this was omitted. No bill of costs and disbursements was presented to the clerk for taxation. He, therefore, omitted nothing, and no claim for cost and disbursements was presented until two years after the entry of judgment. The motion to tax such costs and alter the judgment must therefore be denied.

M. ENDELL ET AL., PLAINTIFFS IN ERROR, VS. JOSIAH T. WALLS, DEFENDANT IN ERROR.

Plaintiffs in Error moved to docket for trial, Defendant in Error moved to dismiss the writ of error because no record of the judgment and proceedings or assignment of errors had been filed. No cause was shown for neglecting to file the assignment. Motion to dismiss granted on grounds stated, and, as further grounds, because the paper on file, purporting to be a record, did not show what judgment was rendered by the court below.

Writ of Error to Circuit Court for Alachua county.

The facts of the case are stated in the opinion.

E. K. Foster for Motion.

B. H. Thrasher, contra.

THE CHIEF-JUSTICE delivered the opinion of the court.

Motion by Plaintiffs in Error to docket this cause for trial, and motion by Defendant in Error to dismiss, because no record of the jugdment and proceedings has been filed by Plaintiffs in error, and no assignment of errors filed by them. No cause is shown for neglecting to file assignment of errors.

The motion that this cause be dismissed from this court for the reasons stated in the motion of Defendant in Error is granted. The paper on file purporting to be a record does not show what judgment was given by the court below, and for this reason, also, it should be dismissed. Neither does the certificate of the clerk show that this is a copy of the record, as required by the rules.

Dismissed.

THE MUSCOGEE LUMBER COMPANY, APPELLANT, VS. WILLIAM K. HYER, ET AL., TRUSTEES, APPELLEES.

1. The English rule, that a trustee, executor or administrator is not entitled to compensation for his care and trouble, unless an allowance is made in the instrument creating the trust, has been qualified in this country, and the converse principle is recognized and generally established.
2. The laws of this State allows to guardians, executors and administrators a compensation for their services, and in analogy, upon equitable principles, a reasonable compensation should be allowed to trustees for their services, care and responsibility incident to their position.

Appeal for the Circuit Court for Escambia county.

The facts of the case are stated in the opinion.

W. A. Blount for Appellant.

E. A. Perry for Appellees.

MR. JUSTICE VANVALKENBURGH deliered the opinion of the court.

In May, 1881, William K. Hyer and Albert Hyer, as Trustees of the bondholders of the Pensacola and Mobile Railroad and Manufacturing Company, together with the Muscogee Lumber Company, filed in Escambia county Circuit Court their bill against the said Pensacola and Mobile Railroad and Manufacturing Company to foreclose a trust mortgage on property of said company, made by the said company in April, 1873, to the said William K. Hyer and Albert Hyer, as trustees, to secure the payment of ninety bonds, of one thousand dollars each, issued by the said Pensacola and Mobile Railroad and Manufacturing Company, which bonds were held by the said Muscogee Lumber Company. Final decree was entered on the 14th July, 1881, providing that the property should be sold for cash or for the bonds and coupons of the defendants upon which the decree was rendered, except that so much of the purchase-money should be paid in cash as might be necessary to pay the costs and expenses of the suit.

The property was sold under the decree, and was purchased by the Muscogee Lumber Company for the sum of fifty-one thousand one hundred and seventy-four dollars and forty-six cents. The trustees, William K. and Albert Hyer, at the time of the sale filed a petition with the Judge of said court, asking compensation for their services as such trustees as follows:

"Your petitioners, W. K. and Albert Hyer, respectfully

represent that they have served as trustees for the holders of the $90,000 of mortgage bonds of said defendant. That to-day, under a decree of foreclosure of the mortgage made to secure said bonds, the said defendants' mortgaged property has all been sold, and your petitioners' duties as trustees have terminated. Whereupon your petitioners pray to be allowed as part of the costs the sum of five hundred dollar for their services and responsibilities as such trustees, or such other sum as your Honor may seem meet and proper," &c.

The defendants filed objections to the granting the compensation asked for in the petition, or any other compensation. Such further proceedings were had that the court ordered and decreed that the trustees be paid the sum of five hundred dollars out of the fund arising from the sale of the property, and that if no funds remained in the hands of the master for that purpose then the beneficiaries of the trust, the Muscogee Lumber Company who were the purchasers at the sale, should pay it.

From this decree the Muscogee Lumber Company appeals and assigns the following error in the petition of appeal:

"The court below erred in decreeing in said suit to appellees against appellants as compensation to appellees the sum of five hundred dollars, or any sum."

The only question involved it whether W. K. and A. Hyer, the trustees named in the mortgage made by the Pensacola and Mobile Railroad and Manufacturing Company, were entitled to compensation, and if they were, is the amount allowed too much?

The English rule at common law is well settled that a trustee is not entitled to compensation for personal trouble and loss of time, unless an allowance is made in the instrument creating the trust. This rule is laid down in Robin-

son vs. Pett, 3 Piere Williams, 249, where the Lord Chancellor says: "It is an established rule that a trustee, executor or administrator shall have no allowance for his care and trouble; the reason of which seems to be, for that on these pretences, if allowed, might the trust estate be loaded and rendered of little value. Besides, the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another, and there can be no hardship in this respect upon any trustee who may choose whether he will accept the trust or not." In Leading Cases in Equity, Vol. 2, Pt. 1, 4th Am. Edition, 514, in reference to this case of Robinson vs. Pett, it is said: "There is no rule of the English comon law at an early period. In the principle case, viz: *that a trustee, executor or administrator shall have no allowance for his care and trouble.* It proceeds upon the well known principle, almost invariably acted upon by courts of equity, that a *trustee shall not profit by his trust.*"

The rule seems to have been in force in this country as a rule of the English common law or at an early period. In 1814, Chancellor Kent in the case of Green vs. Winter, 1 John. Ch. R., 36, says: "The trustee is entitled to a liberal indemnity for his expenses and responsibilities incurred in the due and faithful execution of the trust, but he cannot demand *compensation* beyond what may be founded on the positive agreement of the party." * * * * "The four dollars a day for his time and expenses may be allowed on the ground of a fair indemnity; but I cannot go further, without shaking the best settled principles in respect to the nature and character of the duties of a trustee. Nothing can be stronger or more explicit than the uniform language of the English Court of Chancery upon this point, or if I were even free from the weight of authority I should

hesitate greatly before I undertook to question the policy or wisdom of the rule." Again, in Manning vs. Manning, 1 John. Ch. R., 530, the same Chancellor says: "I return to the point before me, and I think it is not to be denied that the law is *settled* against the claim of a trustee to compensation. The decisions have remained steady and uniform for a century and a half, and the rule applies not to executors merely, but equally of trustees of every description." * * * * "It appears to be the practice in several of the United States to allow a commission of so much per centum to executors and other trustees. (I Wash. R., 246; 4 Hen. & Munf., 415; 1 Munf., 159; 3 Binney, 457.) But this practice cannot be received here as authority, however respectable the source, for it is not founded upon and different construction upon the English law, but upon local uses or statutes, which have confessedly changed the English rule. * * * It is the province of the legislative, and not of the judicial power, to change the law, and our Constitution has auspiciously declared that the common law of England (in which I include of course the equity system) shall continue the law of this State, subject to such alterations and provisions as the Legislature of the State shall, from time to time, make concerning the same." These decisions were founded upon the common law rule; subsequently the Legislature of the State of New York enacted a law by which guardians, executors and administrators were allowed a reasonable sum, in the discretion of the court, for their services over and above their expenses. In the matter of Roberts, a lunatic, 3 John. Ch., 42, the committee of the lunatic prayed for an allowance for compensation as such committee under such statute of 1817. Chancellor Kent thought the case within the equity of the statute, allowed compensation, and, at the same time, established a general rule allowing a per centum to guardians, executors and administrators.

Though the provisions of this statute confined in its terms the allowance of compensation to guardians, executors and administrators, yet, by an equitable construction, it has been extended to committees of the estates of lunatics and to trustees; not only in the State of New York, but in most of the other States having laws siimlar to the one above mentioned for the compensation of guardians, executors, &c.

In Meacham vs. Sternes, 9 Paige, 398, decided in 1842, Chancellor Walworth says: "Upon a full examination of the subject, and in accordance with the principle of the decision of Chancellor Kent in the case *ex-parte* Roberts, before referred to, I have arrived at the conclusion that the trustee in this case, and other trustees similarly situated, are entitled to the same compensation for their services which is allowed by law in the case of executors, administrators or guardians. I am also pleased to find that the same view of this question was taken by the late Judge Washington of the Supreme Court of the United States. In the case of Prevost vs. Gratz, in the Circuit Court of the United States for the District of Pennsylvania in 1818, the question arose whether a trustee was entitled to commission for his services in the discharge of his trust; and, in delivering the opinion of the court, that distinguished Judge says: 'Without intending to meddle with the question whether a trustee in entitled to a commission upon general principles which prevail in courts of equity, we think he is so in this State under the equity of the act of Assembly which allows them to executors, &c.; and such, we understand, has been the practice.' It may therefore be considered the settled rule, so far as the decision of this court can settle it, that in all cases of trust of this description, and all other express trusts of a similar nature, when nothing is said in the deed or instrument creating the trust

on the subject of compensation to the trustee for his personal services in the execution of the trust, and where there is no agreement, on the subject for a different allowance, the trustee, upon the settlement of his accounts, will be allowed the same fixed compensation for his services, by way of commissions, as are allowed by law to executors," &c.; Ogden vs. Murray, 39 N. Y., 202; *In re* Schele, 53 N. Y., 263; Prevost vs. Gratz, 3 Wash. C. C. R., 434.

In Barney vs. Saunders, 16 Howard, 542, Mr. Justice Grier, speaking for the court, says: "In England courts of equity adhere to the principle, which has its origin in the Roman law, 'that a trustee shall not profit by his trust,' and, therefore, that a trustee shall have no allowance for his care and trouble. A different rule prevails generally, if not universally, in this country. Here it is considered just and reasonable that a trustee should receive a fair compensation for his services, and in most cases it is gauged by a certain per centage on the amount of the estate."

In Barrell & Al. vs. Ivey, 16 Mass., 221, the court say: "There is undoubtedly in the execution of most trusts much solicitude and vexation, which cannot be compensated by money, and any trustee must be supposed to understand this when he takes upon himself such a burthen. And it is for this reason probably that in England trustees are generally allowed nothing. * * * In this Commonwealth, however, executors are allowed a reasonable compensation, and there is no reason why trustees should not be. Indeed, it will probably be for the advantage of all who are concerned in estates held in trust that such compensation should be made, as more care and diligence may be expected and required where there is compensation." 12 Pickering, 183; 5 Pick., 161.

In Vermont the common law rule that no compensation will be allowed to the trustee, unless by express agreement,

never obtained. In Hubbard vs. Fisher, 25 Vermont, the court say: "All such officers are here expected to be paid, and may recover reasonable compensation in an action of assumpsit for work and labor and money paid," &c.

In North Carolina it is said that a trustee is entitled to commissions as compensation for his labor in managing the trust committed to him, though no provision be made for it in the deed of trust. 6 Ired. Equ., 228, 495; 5 Ala., 314; 25 Ala., 432.

In the case of Philips, Administrator, vs. Bustard, 1 B. Monroe, 350, the rule upon this subject is formulated as follows: "The British rule has been extensively qualified, if not entirely exploded, by the local law and usages of our own Commonwealth, where tutors and curators, and executors and administrators are all entitled to reasonable compensation. Here, then, the civil law maxim, and all the other analogies which fortified the rule in England, have been abolished, and a converse principle has been recognized and established. Is there now, therefore, any sufficient reason here for applying a rule so harsh and unreasonable to the solitary class of cases denominated express technical trusts? We think not. For similar reasons the court of Pennsylvania, and of our present State, Virginia, have decided that trustees may be entitled to compensation without any express direction or contract therefor. See 3 Binney, 457; 1 Wash., 246; 4 H. & Mun., 415. And this appearing to be intrinsically just, not forbidden by policy, and not only not inconsistent with any analogy in our local jurisprudence, but perfectly consistent with its complete harmony, we do not feel authorized to repudiate it and blindly adhere to the old English rule, the reasons for which, if ever good, are now altogether inapplicable in this age and country whenever it may be presumed that com-

pensation was expected, and seems to be reasonable and just." 8 B. Mon., 571.

The general current of authorities upon this subject seems to be in the same direction, and while in a few of the States the principle of compensating trustees as distinct from executors, administrators and guardians has not been adopted, yet the equitable rule of compensating them in the same manner, and for the same reasons, prevail in a large number of the States.

The laws of this State allow to guardians, executors and administrators a compensation for their services, and in analogy and upon equitable principles we know no reason why a trustee ought not to be allowed a compensation for the care and responsibility incident to his position.

In the month of April, 1873, these trustees were appointed by the Pensacola and Mobile Railroad and Manufacturing Company by their mortgage made to secure the payment of ninety thousand dollars in bonds then issued by them. It would seem from the decree that coupons were attached to the bonds, probably for interest, but when such interest was payable, if at all, we are not informed. The mortgage was foreclosed in 1881, and the appellants, who it also appears from the decree awarding compensation were the beneficiaries of the trust, bought the mortgaged property for the sum of fifty-one thousand one hundred and seventy-four dollars and forty-six cents. The trustees asked for compensation in the sum of five hundred dollars for their services and responsibilities, and the court allowed it. It was upon one fixed sum, of which the court had knowledge from the records on file, and it must have been cognizant of the duties, services and responsibilities of the trustees. It was not, therefore, necessary to refer to a master to determine, as there were no accounts to be examined, and it was in the discretion of the court to allow a reasonable sum.

The amount allowed would not seem to be extravagant, and we can see no reason to interfere with the decree upon the alleged error.

The decree is affirmed.

Wm. Blumer et ux., Appellants, vs. Pollak & Co., Appellees.

1. Where a married woman carries on business in her own name, having property employed in such business, and purchases goods upon her sole credit for the purposes of such business, her separate property may be subjected in equity to the payment of claims for money due for such purchases.
2. Property, viz: furniture purchased by a married woman at the request of her husband, and paid for by her husband, with which they furnish a hotel where husband and wife live with their family, though the hotel business may be superintended by her, and conducted in her name, does not become separate property of the wife unless by some act of the husband indicating an intention that it shall be her separate property. Such property is the property of the husband and is liable for his debts.

Appeal from the Circuit Court for Escambia county.

The bill in this case was filed by appellees to obtain payment of a sum of money alleged to be due from Mrs. Blumer, the wife and co-appellant, for merchandise sold by them to her out of her separate personal property.

It is not denied that she purchased goods of appellees as alleged, but it is alleged by appellants that at the time of such purchase she was and now is the wife of Wm. Blumer, that she bought the goods without the knowledge of her husband, and without his consent or authority.

Complainants allege that for some years past, with the knowledge and consent of her husband, Mrs. Blumer con-

ducted business on her own account in Pensacola, and the goods were sold to her upon her sole credit and to become her sole and separate property, and for the purpose of replenishing her stock of merchandise in the course of her business, and they were so used. It is further alleged that she owns and has legal title to a large amount of separate personal property in Pensacola recently acquired by her by purchase, which is chargeable in equity with the payment of the complainants' demand.

Appellants admit that Mrs. Blumer did once conduct the business of millinery in Pensacola, but it was unprofitable and resulted in a great loss, and she acquired no separate property from the same. They deny that she has or ever had legal title to a large amount or any amount of separate personal property, and deny that she has any separate property or estate of any character.

The bill prays that Mrs. Blumer be enjoined from incumbering or disposing of her separate property, and that the separate property of Mrs. Blumer be decreed to be chargable with the payment of the claim and sold for that purpose.

Wm. Bennett, a witness for complainants, testifies as follows: "I have some knowledge of Mrs. F. Blumer having purchased some property in the past year or two. She purchased of the Louisville Furniture Manufacturing Company, of which I am President, a lot of furniture consisting of assorted household furniture, amounting in value to $431.46; this purchase was made in Louisville, Ky., in the month of December, 1878; the said furniture was shipped to Mrs. F. Blumer, Pensacola, Fla."

Wm. Blumer being duly sworn, says: "I and my wife are defendants in this case. My wife conducted business in the City of Pensacola with my knowledge for two years; my wife is superintending the management of the Euro-

pean Hotel at this time, and has been for about nine months. She has superintended the hotel ever since it was opened. The hotel is conducted in my name. The name of the hotel is the European Hotel. The license for the hotel was taken out last year in the name of my wife. I took out license in my own name on the 16th day of February, A. D. 1881.

"It was generally understood that Mrs. Blumer was the proprietress of the hotel, but I had to foot the bills. The bills were footed partly with the proceeds of the hotel and partly outside. I had knowledge of my wife buying furniture from the Louisville Furniture Manufacturing Company about the time the hotel was opened by us. The furniture is still in the house. I believe that is the only purchase made by her of that company."

Cross-examined—

"I mean by my wife superintending the hotel that I rented the house, footed all the bills, partly with the proceeds of the hotel and partly otherwise; my wife purchased the supplies and I furnished the money. My wife had no pecuniary intest, separate from my own, in the business from its opening until now. When we opened the house we had to have furniture, and I told my wife to make a memorandum of what we needed, and told her to write on to see on what terms we could get this furniture. They replied, for half cash and half in ninety days. My own money was used to purchase that furniture, every dollar of it. At the time the license was first taken out I was short of funds, and my wife went around and saw the Collector, and he gave her one month in which to pay the license; and when the month expired I furnished the money to pay for them, and the license was made out in her name.

"The pecuniary responsibility of the business of the hotel was entirely upon me. I do not know that my wife

has any pecuniary interest in the business, separate from my own, other than as to her wearing apparel—she has no independent interest in the pecuniary or property. The furniture purchased of the Louisville Furniture Manufacturing Company is still in the house, and is mine. There have been no funds accumulated from the profits of the hotel. It has been a losing business to me, inasmuch as I am more or less indebted to the merchants around town on account of it."

Re-direct—

"I never purchased the furniture metioned above from my wife. My wife never derived a dollar from the proceeds of the sale of the remnants of the millinery business. Ever since and before the hotel started I have been keeping a bar, separately and distinct from the hotel, in a different part of the town. The furniture was in part paid for by the proceeds of the hotel. The first payment was paid entirely by myself. The last payment was in part made from the proceeds of the hotel."

Mrs. F. Blumer, being duly sworn, says: "I am one of the parties in this suit. I am acquainted with European Hotel, which is conducted in the City of Pensacola. The license for last year was gotten out by myself and paid for by Mr. Blumer. I have run the hotel for Mr. Blumer.

"The house was advertised in my name in the Pensacola papers. The bills contracted for the hotel were made in my name. The bills were presented to me and paid by me out of the proceeds of the hotel, and the proceeds of the hotel were Mr. Blumer's. The bills referred to were contracted in Pensacola.

"I have ordered furniture from the Louisville Furniture Manufacturing Company for Mr. Blumer. I wrote the order for the furniture and signed my own name to it. I did not remit the money for the first payment, for I was

sick in bed at the time, and Mr. Blumer made the remittance himself, and it was his own money."

Cross-examined—

"The bills referred to as having been contracted in town were paid by money of Mr. Blumer's, proceeds of the business; a portion of these were paid by money taken out of his other business. Mr. Blumer supplied the money for the conducting of the business referred to. I had no interest pecuniarily, only that we opened the European Hotel thinking that if the business would yield a support for our family that Mr. Blumer would give up the business of the Java Saloon, as he was tired of conducting it.

"I have not now, nor never had, any pecuniary or property interest in the business separate and outside of my husband. I have been heretofore, and am now, conducting the business on my husband's responsibility. I have paid money of my own for furniture or supplies for the hotel. Mr. Blumer has supplied the money to meet the demands of the business. I have received no pecuniary or property benefits, separate from my husband, from the business. The only benefit I have derived from the business is my board. I do not own any of the property or furniture connected with the hotel. I do not own any property or furniture derived from the proceeds of the hotel. I have no property in the hotel outside of my wearing apparel."

Re-direct—

"I have no property elsewhere, not five cents' worth. The European Hotel referred to is located on the corner of Government and Railroad or Saragossa streets, in the City of Pensacola, Fla. The building occupied as the European Hotel is rented from month to month. The bills are presented to Mr. Blumer the first of every month and he pays them. I have never purchased but one bill of furniture from the Louisville Furniture Manufacturing Company."

The court decreed that there was due complainants for the goods sold by them to Mrs. Blumer $275.42; that it was a charge upon the separate property of Mrs. Blumer, viz: the furniture in the European Hotel in Pensacola; that the money be paid by a day named or else it shall be sold to satisfy the debt, with interest and costs.

From this decree defendants appealed. They insist that the decree is erroneous, because Mrs. Blumer was incapable of contracting by reason of her coverture.

2. That the credit was given her without reference to her ability to contract, and without reference to any separate estate or property of Mrs. Blumer.

3. That by the testimony Mrs. Blumer at the time, or since the purchase, had not and has not had any separate property.

4. That no money was made in the millinery business, and it was given up before the opening of the European Hotel as appears by the testimony.

5. That the furniture in the European Hotel was the property of Wm. Blumer.

6. That the decree charges the property of Wm. Blumer, and not the separate property of Mrs. Blumer, with a debt illegally contracted by the wife long before the purchase of the furniture for the hotel, and that for these reasons the decree should be reversed.

J. P. Jones and *J. E. Yonge* for Appellants.

Mrs. F. Blumer, being under the disability of *coverture*, cannot make a contract to bind herself personally at common law. The Constitution and statutes of this State make no change in this respect. Dollner, Potter & Co. vs. Snow, *et als.*, 16 Fla., 86; Hodges, *et. al.*, vs. Price, 18 Fla., 342.

The evidence shows that the credit was given to Mrs. F. Blumer personally, it not being pretended that she had,

at the time of the purchase by her, nor since, any separate property upon which to charge the debt. (See the testimony of Mrs. and Mr. Blumer in the cause.)

The principle upon which a wife may charge her separate estate or property is stated to be, "that where by her contract the debt created is made expressly a charge on her separate property, or is expressly contracted on its credit, or where the consideration goes to the benefit of such estate or property, or to enhance its value." There must be an intention at the time of the contract to charge it. Dollner, Potter & Co. vs. Snow, *et als.*, 16 Fla., 86; Schoul. Dom. Rel., 237; 3 Waite's Actions & Defences, 676, and authorities cited.

The testimony shows that Mrs. F. Blumer had no separate property, hence could neither have charged nor intended to charge any separate property, or have contracted with reference to it. (See testimony of Mrs. and Mr. Blumer in the cause.)

The testimony further shows that Mrs. F. Blumer acquired no separate property by her millinery business, but on the contrary, that said business was unremunerative.

The testimony shows that the furniture purchased of the Louisville Manufacturing Company, and which is made subject to Mrs. F. Blumer's debt, was purchased and paid for by her husband's direction and with *his* money.

And even furniture purchased by the wife, with the income of her separate property (where she has it), and mixed with the furniture of the husband, it becomes the property of the husband, unless it was understood between them, at the time of the purchase, that he should hold it as trustee merely. Schoul. Dom. Rel., pp. 207, 216, and authorities cited.

It is a well settled principle, both of law and equity, that, in absence of a distinct gift from the husband, all the wife's

earnings belong to him, and not to herself. And statutes which authorize married women to hold property acquired by gift, grant or purchase do not carry the wife's earnings by implication. If husband and wife carry on a joint business the stock in trade will be subject to husband's obligations. So the husband will be liable for the debts, if it appears that he participated with the wife in the benefits. Schoul. Dom. Rel., p. 242, *et seq.*

Evidence that the property in question was purchased by her, on her own credit, *when she had no separate property,* or other capacity to contract, is evidence of title in her husband. Ab. Trial Ev., p. 168, and authorities cited.

Presumption in favor of purchase with husband's means, unless proof that it was made with wife's separate funds. Price vs. Sanchez, 8 Fla., 136.

There is nothing in the testimony showing any relation between the separate property, defectively described and pretended to exist in Mrs. F. Blumer, in the bill of complaint, and the property charged in the decree, to-wit: "*The furniture in the European Hotel,*" which was purchased long after the abandonment of the millinery business, and which, according both to the law and the testimony, belongs to the husband, William Blumer.

John C. Avery for Appellees.

The appellees claim (1) that the property in question belongs to Mrs. F. Blumer, or that, at least, the conduct of the appellants has been such as to estop them, in equity, from maintaining the contrary; and (2) that it is chargeable in equity with the payment of their demand.

First. For the purposes of this case this property must be treated as the separate statutory property of Mrs. Blumer.

The appellees were compelled to take as witnesses the ap-

pellants, who, it will be seen, inject into their testimony, at every step, assertions that the property belongs to Mr. Blumer. Fortunately, however, for the appellees, such averments are only conclusions of law, and sufficient facts are elicited to establish, for the purposes of this case, ownership in the wife.

From the evidence we have the following state of facts: The property was bought in the name of the wife; it was ordered by her; credit was given to her; the husband was not mentioned in the transaction; the furniture upon its arrival here was put into a hotel managed by her, conducted in her name, and advertised in her name in the local papers, and for conducting which a license was issued to her in her name and on her demand; and she had charge of the hotel whilst her husband conducted a separate and different business elsewhere.

It thus appears that every act which the public could view indicated that the furniture was the property of Mrs. Blumer, and that the hotel business was hers alone.

The public could not be apprised of the secret understanding between the appellants.

If it is true that there was such an understanding, they were exceedingly careful to produce a different impression upon others; and the reasonable conclusion is that their object was to put the property out of the reach of his creditors.

And now that her creditors are pursuing it, a court of equity will not assist the appellants to tear away the badges of ownership which they deliberately, and perhaps designedly, put upon it.

Second. If the property in question is to be treated as that of Mrs. Blumer, then it is her separate statutory property, and the question arises whether it is chargeable in equity with the payment of the appellees' claim.

Separate statutory property is in this regard just like separate equitable estate, of which the married woman has the *jus disponendi*, because a married woman has, in Florida at least, the right of disposing of her separate statutory property.

"The principle applies to separate estates under the statute, as well as to estates settled to her sole and separate use by deed or device." Williams vs. Urmston, 35 Ohio St., 296; s. c., 35 Am. Reps., 611; 2 Bish. on Law of Md. Women, Secs. 203 and 4; 18 N. Y., 265; 37 N. Y., 35; 23 Ala., 639; 22 Barb., 317.

"Out of the power which a *feme covert* has to dispose of her separate estate, or the income thereof, grows the lesser power, which is included in the other, to charge the estate with a specific debt or engagement. And the doctrine is universal in our American courts that the lesser power arises wherever the greater does." Bishop on the Law of Married Woman, §850; 2 Story's Eq. Jr., §1399; Jackson vs. West, 22 Md., 71; Gunter vs. Williams, 40 Ala., 561; Taylor vs. Shelton, 30 Conn., 122; North Am. C. Co. vs. Dyett, 7 Paige, 9; Dyett vs. N. Am. C. Co., 570.

I do not think the husband is required to join with his wife in order to create such charge, even if that were necessary in case of a conveyance of personal statutory property. The charge is not a conveyance, a mortgage or even a lien. It is at most an appointment out of the estate. 2 Story's Equity, §1396, Jr.

Equity only lays hold of the property to pay the debt. Oliver vs. Dickenson, 1 Craig & Phillips, 48, cited in note 2 of 2 Story's Eq. Jr., §1937, 12th Ed.

But if the husband's assent is necessary, that must be presumed from his knowledge of his wife's being in business, which implies the giving and receiving of credit.

Are the circumstances surrounding the origin of the ap-

pellees' claim sufficient to create a charge in equity upon the separate property of Mrs. Blumer?

The tendency of the courts now is to presume such charge in almost ever case where a *feme covert* makes a debt. The creation of the debt is *prima facie* evidence of an intention to charge the estate. I Bishop's Law of Married Women, §878; Greenough vs. Wiggingson, 2 Greene, Iowa, 435; Collins vs. Rudolph, 19 Ala., 616; Ozley vs. Ikelheimer, 26 Ala., 332; 1 Story's Eq. Jr., §1400.

But in this case the debt was contracted by Mrs. Blumer with the appellees for the benefit of her business, which was her property and part of her separate estate. The debt is due for goods purchased by her from the appellees for the purpose of replenishing her stock. In every such case a charge arises which equity will enforce.

"It is believed to be the universal doctrine, if anything on this subject can be said to be so, that when a married woman contracts for the benefit of her separate estate, and the contract is silent as to source of payment, it shall be presumed to be a charge on such estate." 1 Bishop on the Law of Married Woman, §875; Frazer vs. Brownlow, 3 Ir. Eq., 237; Gardner vs. Gardner, 22 Wend., 526; Palm vs. Lent, 5 Bosn., 713; Dyett vs. N. A. C. Co., 20 Wend., 570; Franklyn vs. Beatty, 27 Minn., 347.

But the peculiar circumstances under which this debt was made should be sufficient in equity to bind the property of the wife without reference to the last mentioned rule.

The credit was given to the wife alone. It was to assist her in her separate business. The giving of the credit was accompanied by risks such as are incidental to business. In the event of a failure in business no resort could be had against her personally. Her property was the only security that could be looked to in case of her failure to pay, whether from misfortune or fraud. The conclusion, therefore, seems

natural that it was in contemplation of the parties that the appellees' security should be the wife's property.

THE CHIEF-JUSTICE delivered the opinion of the court.

There has been much conflict in the decisions of courts of equity on the subject of the character of the contract of a married woman by which a debt may be created which will be a charge, or chargeable upon her separate estate or property, real or personal.

Neither the courts in England nor those of this country are in harmony on the question.

Some of them hold that any credit obtained by her for any purpose, or any promise by her to pay money, whether for her own use or as a security for her husband or another, is sufficient to create a charge upon her separate property. Others hold that a married woman's debt is chargeable in equity upon her estate only when contracted on the credit of the separate estate, or for its benefit, or for the benefit of the woman, and this, not upon the ground that the contracting of the debt is of itself an appointment or charge, but because she, having had the benefit of the money or property for which she agreed to pay, it is just that her estate should answer it. The subject is very fully discussed in Story's Eq. Jur., §1400, *et seq.*; 1 Bish. Law of Married Women, §§854, 1879.

The case of Yale vs. Dederer was before the Supreme Court of New York in 21 Barb., 286; 31 Barb., 525; and in the Court of Appeals in 18 N. Y., 265; and 22 N. Y., 450, in which the subject received a very thorough discussion and all the leading adjudications examined. Selden, J., in the last case, remarks: "No rule can ever be stable, the reasons for which are constantly changing. If we desire precision and certainty in this branch of the law, we must recur to the foundation of the power of a *feme covert*

to charge her separate estate, and this has heretofore arisen solely from her incidental power to dispose of that estate. Starting from this point it is plain that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would of course be a lien, upon a well founded presumption that the parties so intended, and in analogy to the doctrine of equitable mortgage for purchase-money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention; and there is no reason why her acts in this respect should not be tested by the same principles and rules of evidence which are applied to similar questions in other cases." All the Judges concurred.

The court in Massachusetts (Willard vs. Eastman, 15 Gray, 328,) indorsed the rule in Yale vs. Dederer. These decisions are strongly fortified by argument and sound reason.

Whichever rule prevails the bill in the case at bar may be sustained. It alleges that Mrs. Blumer was carrying on business at Pensacola in her own right with the knowledge and consent of her husband, and in the course of that business, which had been so conducted by her for several years, she purchased goods from complainants with which to replenish her stock of merchandise, and the goods so purchased are not paid for. This allegation is sufficient to show *prima facie* that she had separate property and made the purchases to enhance that property.

Under the rule announced by all the courts, though Mrs. Blumer is not liable to be sued at law or in equity to establish a personal judgment against her, yet in equity the court may subject her separate property to the payment of any indebtedness contracted by her for the benefit of such separate property.

Holding that the bill can be maintained for this purpose, we next inquire whether she has such separate property, and whether the furniture in the European Hotel is such property as was found by the decree, and directed to be sold to satisfy the claim. That property was ordered by her and shipped in her name, and was put into the hotel where the business of keeping lodgers and boarders was conducted in her name; the license issued in her name; she advertised the house as kept by her, and provisions and supplies were purchased for the house, and bills made therefor in her name. But the answer of the defendants and their testimony shows that the furniture, though ordered by her and shipped in her name, was paid for in part by the husband and in part by the earnings of the hotel; the money to pay for the license was furnished by him; he rented the house and paid the rents; he is indebted to persons about town on account of the hotel; she had no money left of the business formerly carried on, and she had no money invested in the hotel, in the furniture or the business. The hotel business was entered into for the purpose of support of Blumer and his wife and family, and no money has been made by it beyond that. They live together in the hotel, she having the care and superintendence of it, while he carries on other business out of which he has paid a portion of the expenses of the furnishing, supplying and conducting the hotel.

The answer denies the equities of the bill as to the wife having any present separate property, and this denial is not met by competent proofs in rebuttal. The testimony shows that the property was paid for by him and out of means furnished by him. While the fact was that the bills were made in her name and the business conducted in her name, yet she put no money or property of her own into it. No gift or transfer by the husband to the wife of the property

or its proceeds is apparent. Her order of the furniture, though in her name, was the result of his request that she make a list of what they required and "write on to see on what terms" it could be procured. She acted as his agent, as the testimony shows. No fraud is charged or proved.

The evidence establishes that the property in the hotel is that of the husband, and is subject to the payment of his debts. No credit was extended to her by these complainants on the faith that she was the owner of this furniture, for it was procured long after she purchased the goods from them, and was therefore the basis of her credit.

Our conclusion, therefore, is that the furniture in the European Hotel is not the separate property or estate of Mrs. Blumer, and that the decree to that effect, and that it be sold to pay the complainants' claim, must be reversed, and it is so decreed, with costs against appellees.

JOHN WEBB, APPELLANT, THOMAS DUNN, ET AL., APPELLEES.

Chapter 3159 of the Laws of 1879, being an act to amend section four of an act entitled an act to establish the office of Harbor Master for the Port of Pensacola, approved December 8, 1866, providing that the Harbor Master may demand, for every vessel that may enter the port and load or unload, or make fast to any wharf, certain fees, whether earned by any service rendered to any such vessel or not, is a law imposing a tax upon such vessels or their owners, and a "regulation of commerce" within the terms of the third paragraph of section eight, Article 1, of the Constitution of the United States, which grants to Congress "the power to regulate commerce with foreign nations, and among the several States," and said act is therefore unconstitutional and void.

Appeal from the Circuit Court for Escambia county.

The facts of the case are stated in the opinion.

J. E. Yonge and *Geo. P. Raney* for Appellant.

W. A. Blount for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

Dunn and Elliot, of Maine, owners of vessels doing business between ports north of Cape Hatteras, on the Atlantic coast of the United States, and Pensacola, brought their bill against Webb, the Harbor Master of the port of Pensacola, to restrain him from exacting certain fees, and from prosecuting certain suits commenced for the purpose of enforcing payment of such fees to which the Harbor Master claimed to be entitled, by virtue of the provisions of Chapter 1620 of the Laws of Florida, passed in 1866, and Chapter 3159, Laws of 1879. The Harbor Master demands for each vessel loading or unloading, or making fast to any wharf, the fees mentioned in the act without reference to whether any services are performed, or whether such services are necessary or required, except the boarding of vessels and tendering such services as he might be called on to perform, and demanding the fees.

The injunction having been granted, Webb, Harbor Master, appeals.

An act to establish the office of Harbor Master for the port of Pensacola, approved December 8, 1866, (Ch. 1620,) provides for the appointment of a Harbor Master, and prescribes his duties. The third section provides that "said Harbor Master, under the rules and regulations to be established by the Board of Port Wardens for the port of Pensacola, shall have authority to regulate and station all vessels in the bay fronting the City of Pensacola and at the whaves thereof, and remove, from time to time, such vessels as are not employed in receiving and discharging their cargoes to make room for such others as require to be

more immediately accommodated for the purpose of receiving or discharging their cargoes," and makes the Harbor Master the umpire to determine the relative rights of position of vessels.

The fourth section, as amended in 1879, (Ch. 3159,) provides "that the Harbor Master shall have power to demand and receive from the commanders, owners or consignees, or either of them, of every vessel that may enter the port of Pensacola and load or unload, or make fast to any wharf, the following fees, viz: For any vessel drawing less than ten feet, the sum of five dollars; and for any vessel drawing more than ten feet, the sum of one dollar for each additional foot: *Provided*, This section shall not extend to flats, keel-boats, steamboats or other vessels regularly employed in the trade between the port of Pensacola and the ports in the States of Alabama, Louisiana and Texas."

It is further (by the act of 1866) made the duty of the Harbor Master to superintend and enforce all laws of the State and of the city for preventing and removing nuisances upon the wharves and water front; and to demand of the captain of every vessel arriving from sea the permit of the resident physician or bill of health, and to report to the Mayor all vessels entering without such permit.

The claim on the part of the complainants is that the act in question, so far as it provides fees to the Harbor Master, to be paid for each vessel from another State which may receive or discharge cargo, or make fast to any wharf in Pensacola, is in violation of Art. I., Section 8, Par. 3, Constitution of the United States, providing that "Congress shall have power to regulate commerce with foreign nations and among the several States;" and of Section 10, of the same article, which prohibits the State, without the consent of Congress, to "lay any duty of tonnage;" and that it is contrary to the rights of the citizens of each State to

enjoy all the privileges and immunities of citizens in the several States guaranteed by Sec. 2 of Art. IV.; and that it is in violation of Sec. 9, Par. 5, Art. I., providing that vessels bound to or from one State shall not be obliged to enter, clear or pay duties in another.

The power to regulate commerce granted to Congress is necessarily exclusive, and the same power cannot be constitutionally exercised by the States. 14 Peters, 570; 5 Wheat., 23; 9 Wheat., 196; 12 Wheat., 446; 15 Peters, 511; 11 Peters, 158; 7 How., 283; 6 Wall., 31; 10 Otto, 259.

A tax levied by a law of New York of a given sum upon the master and each of the sailors and passengers of a vessel coming from a foreign port was, under this Federal power to regulate commerce, declared to be unconstitutional and void. The application of the moneys for the support of a marine hospital, and for other purposes, does not affect the principle. "The amount and application of this tax are only important to show the consequence of the exercise of the power of the States. The principle involved is vital to the commercial power of the Union." 7 How., 404.

"Congress possesses the power to regulate commerce with foreign nations and among the several States, and it is well settled law that the word commerce, as used in the Constitution, comprehends navigation, and that it extends to every species of commercial intercourse between the States and foreign nations, and to all commerce in the several States except such as is completely internal, and which does not extend to or affect other States." State Tonnage Cases, 12 Wall., 214.

The case of Steamship Co. vs. Port Wardens, 6 Wall., 31, arose upon a statute of Louisiana enacting that the Master and Wardens of the port of New Orleans should be entitled to demand and receive, in addition to other fees,

sum of five dollars, whether called on to perform any service or not, for every vessel arriving in that port. Chase, C. J., delivering the opinion of the court, remarks that the power to regulate commerce was given to Congress in comprehensive terms with the obvious intent to place that commerce beyond interruption or embarrassment arising from the conflicting or hostile State regulations. The power to enact inspection laws and some other powers, the exercise of which may, in various degrees, affect commerce, including quarantine and other health laws, laws concerning the domestic police and laws regulating the internal trade of a State, are recognized, however, as within the authority of the State. The pilot laws are expressly recognized by Congress.

The court says: "That the act of the Legislature of Louisiana in question is a regulation of commerce can hardly be doubted. It imposes a *tax* upon every ship entering the port of New Orleans, to be collected upon every entry." It was claimed, however, that this tax was for compensation to the Harbor Master and Wardens, whose duties were defined by the act, but the court say: "There are two answers to this proposition. The first is that no act of Congress recognizes such laws as that of Louisiana as proper and beneficial regulations, while the State laws in respect to pilotage are thus recognized. The second is that the right to recover pilotage and half pilotage, as prescribed by State legislation, rests not only on State laws, but on contract. * * But in the case before us there were no services, and no offer to perform any. The State law is express. It subjects the vessel to the demand of the Master and Wardens 'whether they be called on to perform any service or not.' It may be true that the existence of such a body of men is beneficial to commerce, but the same is true of the government of the State, of the

city government, of the courts, of the whole body of public functionaries. If the constitutionality of the charge the benefit of the Master and Wardens can be maintained upon the ground that it secures compensation for for services, it is difficult to perceive upon what grounds the constitutionality of any State law imposing taxes for the benefit of the State government upon vessels landing in its ports can be questioned.

"We think it quite clear, therefore, that the regulation of commerce made by the act before us comes within none of the limitations or exceptions to the general rule of the Constitution that the regulation of commerce among the States is in Congress." The act Louisiana was declared void as a tax upon commerce, a restriction upon commercial intercourse; a sovereign exaction and not a charge for compensation; a regulation of commerce, and also a duty of tonnage.

The judgment of the court in Cannon vs. New Orleans, 20 Wall., 577, upon another ordinance of that city charging upon every steam vessel which shall moor or land in any part of the city ten cents per ton for levee and wharfage dues, without reference to whether services were performed or not, was that the ordinance was unconstitutional and void. The court say: "We are of the opinion that upon the face of the ordinance itself, * * the dues here claimed cannot be supported as a compensation for the use of the the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi river, within the city of New Orleans, for the privilege of so landing or mooring." This is declared to be a duty of tonnage, to be measured by the capacity of the vessel, and the court further remark: In saying this we do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a

wharf or pier owned by an individual or by a municipal or other corporation a just compensation for the use of the property."

In the case of Inman Steamship Co. vs. Tinker, 4 Otto, 238, the Legislature of New York, by an act defining and regulating the powers, duties and compensation of the Captain of the port and Harbor Masters of New York, had prescribed certain *fees* to be collected from ships or vessels that are permitted to enter the port, or load or unload, or make fast to any wharf therein, at one-half of one cent per ton of U. S. vessels and three cents per ton of foreign vessels, such fees to be computed according to the registered tonnage of each vessel. The act was condemned as an imposition of tonnage duties, and the court remark further that: "In this law of the State there are several points that must not be overlooked. The charge is not exacted for any services rendered or offered to be rendered. * * * * The charge is applied wholly irrespective of the *ad valorem* principle. * * The act makes a discrimination. To one class of vessels it applies the rate here in question, to another class double that rate, and to yet another class none at all. Those belonging to the latter are wholly exempted. * * The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is that it is exacted where there is *nothing to be paid for,* and has no reference to any circumstances in this connection but the tonnage of the vessel and *the class* to which it belongs. The commerce clauses of the Constitution had their origin in a wise and salutary policy. They give to Congress the entire control of the foreign and inter-State commerce of the country."

It will be observed that the act of the New York Legislature is criticised and condemned, not alone because it imposed a duty of tonnage, but that its effect was to levy a

tax, not to pay for services rendered, nor upon any system of equality and uniformity in view of the *ad valorem* system of levying taxes which prevailed in New York, but discriminates as to the charges upon vessels arriving from different ports. The act was considered inimical to the "commerce clauses of the Constitution" because of these peculiar features, notwithstanding the fees to be collected from "all vessels that load or unload or make fast to any wharf" in the city as compensation to the Captain of the port and Harbor Masters of New York.

In the case of the Packett Co. vs. St. Louis, 10 Otto, 423, Vicksburg vs. Tobin, ib., 430, and Packet Co. vs. Keokuk, 5 Otto, 80, the Supreme Court held that wharfage charges *for the use of the wharves* belonging to the city might be extracted from the vessels *using* the wharves, and the fact that the rate of such charges was ascertained by the tonnage measurement of each vessel did not vitiate the legislation imposing them, it being considered in those cases that *compensation* and not taxation were the ends contemplated, the charge resting upon contract and not upon the arbitrary power of taxation.

The pilot laws of the States are expressly sanctioned and authorized by Congress, and are as much laws of the United States as if they had been specially enacted by Congress. 7 How., 402; 12 How., 299; 6 Wall., 31.

The rules prescribed in respect to the charges for pilotage and half pilotage are regulations of contract, and contemplate that the necessities of navigation require the tender of pilotage to vessels approaching ports. Such laws exact of pilots great vigilance and hazard for the protection of commerce, which is compensated by certain charges of pilotage or half pilotage for services rendered or tendered. These rules originally prescribed by the States are older than the Constitution of the United States, and moreover

have been expressly adopted and authorized by Congress since the adoption of the Constitution.

If it be claimed that the act of the Legislature of Florida prescribing Harbor Masters' fees to be paid by vessels taking cargo in the port or making fast to a wharf is founded upon the same principles as the provision in respect to pilotage, such claim is erroneous upon the very face of the proposition. The two things are entirely unlike in their office, origin and necessity.

However convenient or valuable may be the office or services of a Harbor Master he is created by the statute of the State for police purposes. Every vessel is presumed to require the services of a pilot on approaching a port, and the laws of the States and of the Union require that the services of a pilot shall be tendered and paid for for the protection of lives and property. The services of a Harbor Master may or may not be required for the landing or loading of a ship. Clearly if a ship does not require these services, and does not demand them, the imposition of fees, to be paid to an officer of the State, is simply a method of compulsory taxation, no specific service being performed. The element of contract is entirely absent.

The tender of services by the Harbor Master is not required by the terms of the law, and hence his voluntary tender of services not required can give him no title to compensation.

The act of 1866 prescribes the duties of the Harbor Master, and by its terms he has "authority to regulate and station all vessels in the bay fronting the City of Pensacola, and at the wharves thereof, and to remove, from time to time, such vessels as are not employed in receiving and discharging their cargoes to make room for such others as require to be more immediately accommodated," and to be the umpire in case of certain disputes; these, and his duty to

demand the permit of the physician or bill of health of every vessel arriving from sea, are the only services mentioned in the act.

Beyond the demand of the permit or bill of health he is merely "authorized" to act when called upon for that purpose. The fourth section empowers him to demand and receive from the commander, owner or consignee "of every vessel that may enter the port and load or unload, or make fast to any wharf," the fees described, excepting those vessels employed in trade between the ports of Alabama, Louisiana and Texas.

These fees are not designated as compensation for any service actually performed for any vessel, but are to be demanded "whether called on to render any service or not," as plainly as though those words were used in the law as they were used in the act of the Legislature of Louisiana, which was condemned in Steamship Company vs. Port Wardens, 6 Wall., 31. It was claimed in that case that this tax was for compensation to the Harbor Master and Wardens, whose duties were defined in the act; and so it is claimed here that the Harbor Master is required to provide conveniences and facilities for the benefit of every vessel that arrives and lands at Pensacola, and that thus every vessel should pay him "fees" whether called on to perform any special service or not. But the court in that case said that fees exacted in this manner were a tax, and that if its constitutionality could be maintained "upon the ground that it secures compensation for services, it is difficult to perceive upon what grounds the constitutionality of any State law imposing taxes for the benefit of the State government upon vessels landing in its ports can be questioned:" and "that the act of the Legislature of Louisiana in question is a regulation of commerce can hardly be doubted." And the court said, as we have seen, that no

act of Congress recognizes such laws as proper and beneficial regulations, while the State regulations in respect to pilotage are thus recognized.

Were these services actually required and rendered by the Harbor Master in each case, (such services as are mentioned in the act,) the only question would be whether the amount of compensation was reasonable or exorbitant, but that case is not presented.

The fees mentioned cannot be construed to refer to compensation for the use of wharves of the city, for it does not appear that the city owned any wharves, or had any proprietary control of wharves, nor that the Harbor Master had any such control. The fees constitute a tax, pure and simple, to be paid without regard to services performed; that such a tax is a regulation of commerce within the meaning of the Constitution is clearly held in the cases cited. A requirement of the payment of money for the support of an officer of the State for the privilege of landing or loading or discharging cargo is plainly a regulation or condition imposed upon commercial transactions by means of ships. The act declares to the carrier or consignee that the condition of landing at the port is not that he pay for the use of whaves of the city or of individuals, nor that he pay for any service or aid rendered to the vessel by the Harbor Master, but that he shall pay so much money if the ship receive or discharge a cargo, or tie up to any wharf in the city, for the benefit of an officer who is authorized to perform certain duties if called upon to perform and not otherwise.

As a "regulation of commerce" the act in question is in violation of the provisions of the Constitution of the United States on that subject.

Much argument was had upon the question whether the act was in violation of that provision of the Constitution

forbidding the States, without the consent of Congress, to lay any duty of tonnage. It is unnecrssary in the view taken of the character of the act to discuss that question.

Without question, the act, discriminating as it does against the ports of several States by imposing the burthen of supporting the Port Warden of Pensacola upon the commerce of foreign countries and of other States of the Union, excepting the favored States of Alabama, Louisiana and Texas, is partial and unequal, contrary to the spirit at least of the provision of the Constitution which secures to the citizens of each State all the privileges and immunities of citizens in the several States.

The decree of the Circuit Court is affirmed.

WILLIAM NICKELS ET AL., APPELLANTS, VS. FRANK PHILIPS APPELLEE.

Where a trustee holds the mere naked title to property for the use of the beneficiaries who have for years enjoyed the undisturbed possession, and the conduct of the trustee has not been such as to endanger the property or disturb its enjoyment, or show a want of integrity, capacity or fidelity, the mere fact that he forbids the beneficiaries to hold any social intercourse with himself or his family is not a sufficient ground upon which to demand the removal of the trustee.

Appellants filed a bill against Philips for the purpose of procuring his removal from the office of trustee.

William Nickels in 1868 purchased and caused to be conveyed to Philips, as trustee, certain lots in Marianna to hold "for the sole and separate use, benefit and behoof of the said Catharine Nickels, wife of William Nickels, during her life, and for the use, benefit and behoof of Louisa

M. Nickels and Charles Nickels." Charles Nickels is dead, and Catharine Nickels and Louisa M. Nickels are the remaining beneficiaries, and, together with William Nickels, are in possession of the property. The trustee has not intermeddled with the property or its rents and profits.

The complaint against him is: "That since the creation of said trust unfriendly feelings have been engendered between your oratrix, Louisa M. Nickels, and the defendant, which have become and have been for several years so intensified that all communications between them have ceased, and consequently her situation will be an exceedingly unpleasant one at the death of your orator, if she survives him, with an insane mother to care for and no male person to look to for advice and assistance, save her trustee with whom she cannot speak, and your oratrix and orator are of the opinion that it will be conducive to the interest of all the parties concerned, and it will certainly lessen the unpleasant anxiety of your oratrix to have another trustee appointed in the place of the defendant."

By an amendment to the bill Louisa M. Nickels alleges that she is not aware of ever having furnished any ground for the intense unfriendly feeling existing between her and the defendant. Nevertheless, several years ago he sent a written communication to her forbidding her to visit his house, notwithstanding his wife is her sister, and has also forbid his wife and children from visiting her; since which time he has refused to speak to her, and she is informed and believes he openly announces himself as her enemy, expressing his feelings in the most vindictive manner, and she apprehends he will give her much trouble in the event she survives her father. William Nickels also alleges that about the time this suit was commenced this defendant sent him a letter forbidding him to have any communication with defendant or his family, and he is therefore de-

nied the privilege of communication with his daughter, the wife of defendant. He is not aware of ever having given defendant any cause for this treatment, he is quite aged, and he fears that defendant contemplates at some future time using his trusteeship for the purpose of annoying or injuring complainants. The prayer is that Philips be removed and some suitable person be appointed in his place. The defendant demurred for want of equity. The Chancellor sustained the demurrer, and complainants appealed.

D. L. McKinnon for Appellants.

McClellan & Milton for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

The courts have sometimes removed a joint trustee "upon the ground that the other co-trustees would not act with him, for in a case where a trust is to be executed, if the parties have become so hostile to each other that they will not act together, the danger to the due execution of the trust and the due disposition of the trust fund requires such an interposition to prevent irreparable mischief. In cases of positive misconduct courts of equity have no difficulty in interposing to remove trustees who have abused their trust.

"It is not, indeed, every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity, or a want of reasonable fidelity."

"The appointment of new trustees is an ordinary remedy, enforced by courts of equity in all cases where there is a failure of suitable trustees to perform the trust, either

from accident, or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause." Story's Eq. Jur., §§1287, 1289.

The rules thus laid down by Judge Story are the result of all the adjudications touching the subject. All the "causes" mentioned in the books for the removal of trustees are such as are substantial and such as to require the interposition of the court in order to preserve the property for the benefit of the *cestui que trust,* and to secure its management for the best interests of the parties concerned.

There is no allegation in the bill of any unfitness of the defendant or any want of care in the management of the property. Indeed the complainants have always since its purchase enjoyed it without any interference and unmolested by him. No fact is stated showing that he has any disposition to annoy them in any manner or to do any act to affect the property to their injury or discomfort. He is a mere naked trustee holding the legal title for their benefit and convenience.

The only charge against him is that he has denied to them social intercourse with himself and his family. While such a state of things is to be regretted, yet the uniform rule adopted by the courts is that unless the conduct, condition or omissions of the trustee are such as to endanger the property or disturb the enjoyment of it, or shall show a want of integrity, capacity or fidelity in the discharge of his duty as a trustee, the court will not interfere. The mere existence of a family feud, not resulting in any damage whatever, nor threatening to impair or in any wise affect the rights of the parties, is not a sufficient ground upon which to demand the intervention of the court to displace the trustee.

The decree of the Circuit Court is affirmed.

THOMAS W. CARR, APPELLANT, VS. JOHN G. THOMAS ET AL., APPELLEES.

1. Under the Bankruptcy Act of Congress of 1867, an attachment levy is not displaced by the bankrupt proceedings unless the same are commenced within four months after the levy of the attachment.
2. The Fifth Section of Chapter 1939, Laws of 1873, found in McClellan's Digest, page 219, does not relate to the subject or the object of the act as expressed in its title, or to any matter properly connected therewith, and said section is inoperative and void under Section 14, of Article IV., of the Constitution.
3. Where a deed of conveyance is executed and delivered, but not recorded until after an attachment has been levied in a suit against the grantor, the lien of the attachment will bind the property as against the grantee in the deed, unless the attaching creditor had notice of the conveyance at the time of the levy of the attachment.
4. Where parties proceed to a hearing of a suit in equity all the allegations of the answer responsive to the bill are taken as true, unless they are disproven by evidence of greater weight than the testimony of a single witness.

Appeal from the Circuit Court for Madison county.

This suit was commenced in Leon County and transferred to Madison.

Carr filed a bill to foreclose a mortgage executed by John G. Thomas, dated 24th February, 1872, upon certain land in Leon county, in favor of the firm of Ketchum & Hartridge, of Savannah, to secure the payment to them of six hundred dollars and interest, according to a promissory note due December 1, 1872, signed by said Thomas, which note and mortgage were assigned by Ketchum & Hartridge to Young & Gordon, of Savannah, and by Young assigned to Carr. The bill was filed May 1, 1878.

In November, 1879, an agreement was filed, which was entitled "William P. Drumright vs. Thomas W. Carr, action of ejectment," and "Thomas W. Carr vs. John G.

Thomas, bill for foreclosure," signed by the attorneys and solicitors of the parties, reciting that an action of ejectment had been commenced in March, 1878, by Drumright against Carr for the recovery of the land described in the mortgage, Carr being in possession, and it was desirable that all questions "capable of being brought to an issue between them of concerning or growing out of, or connected with their relation to said lands and rents, and profits and occupation, and use thereof, and said mortgage and mortgage debts, and all accounts and claims in reference thereto shall be determined and decided in one suit or action. It is therefore consented and agreed between the said parties that the said actions and suits shall be, and shall be declared and held to be, united and consolidated into one suit and action, and that all questions at issue, or capable of being brought to issue as aforesaid between the said parties, shall be decided and determined in one united and consolidated suit and action, in accordance with the principles and practice of courts of chancery; the said parties mutually waiving all questions of jurisdiction and of the statute of limitations. The said Drumright to become a party defendant to the said bill of foreclosure with the right to answer the same, his answer to be available to him both for an answer and as a cross-bill for the setting up of any defences that he may have against the foreclosure of said mortgage, and also for the assertion and maintenance and litigation of all the rights and claims which he may have, whether in law or in equity, to and respecting said land, and of the rents, issues and profits, use and occupation and proceeds thereof." The answer to the bill of complaint to be put in without oath.

Drumright thereupon filed his answer and cross-bill, alleging that he was informed that the mortgage had been satisfied by the shipment of cotton, the property of Thomas,

to the mortgagees; that soon after that the mortgagees were declared bankrupt, and their property went into the hands of assignees, one of whom was Lewis Young. Drumright further alleges that on or about the 15th March, 1873, he purchased from defendant, Thomas, the land in question for $2,910.25, which he paid, and the conveyance thereof was executed in Georgia, and that Carr was immediately informed thereof; that the title deed was not immediately forwarded for record, but soon afterwards was sent to his attorney in Tallahassee to be recorded, but through inadvertence or neglect it was not recorded until October 8, 1874, of which delay he was ignorant, and supposed it had been recorded within a few months after its date; that after Carr was informed of the sale, to-wit: on the 21st October, 1873, he (Carr) sued out a writ of attachment against the property and had it levied on the land, and on February 7, 1876, obtained judgment, under which the land was sold in May, 1876, Carr being the purchaser, and a deed was made to him by the sheriff; that Carr knew also before taking judgment that proceedings in bankruptcy were, or had been, pending in Georgia against Thomas, who had been declared a bankrupt and had been discharged from the said indebtedness, Carr being one of the creditors mentioned in the schedule, and the said debt being one of the debts therein mentioned; that Carr knew when the mortgage was assigned to him that it had been satisfied by shipments of cotton; denies that the assignee, Young, made any valid assignment of the mortgage, or that complainant is the holder of the note, or that he paid value for it, and demands strict proof; charges that Carr has received the rents and profits of the land from 1873 to the present time, and should be charged therewith, and if anything is found due to complainant upon the note and mortgage, after deducting the rents and profits, Drumright offers to pay it

and redeem the property; charges that the proceedings of complainant are inequitable, and the foreclosure was instituted for the purpose of bolstering his pretended title under the attachment suit and sheriff's sale; insists that Carr should not be permitted to hold the mortgage security for more than he paid for it; that Carr knew of the sale to Drumright, and was requested by Thomas to act as Drumright's agent, and account to him for the proceeds of the place; that Carr knew of the bankruptcy and final discharge of Thomas before he obtained judgment under his attachment, and the latter and the sale were a fraud upon Drumright.

The cross-bill prays that the attachment proceedings, judgment and sale to Carr be adjudged void and be cancelled, that Drumright be decreed to be the rightful owner of the land and put in possession thereof; that Carr be decreed to be answerable to him for the use and occupation from the date of his deed; that an account be taken thereof and for general relief; that a receiver be appointed to take charge, &c.

To this answer and cross-bill complainant demurred upon the ground that it does not make a case which establishes his right, title or interest in the land claimed by him.

The demurrer was overruled.

Complainant then plead "that at the time complainant commenced proceedings of attachment against John G. Thomas by attaching the land which is the foundation of this suit, * * he, the said Thomas W. Carr, having no notice of such deed, and the said deed not having been recorded within six months after the execution of the same, is void as against the said Thomas W. Carr as subsequent purchaser, and the said complainant prays judgment, &c.

At the final hearing this plea was overruled.

Complainant answered the cross-bill, and says that

Thomas, neither by himself nor by his agent, ever paid the note secured by the mortgage or any part of it; denies that he shipped cotton to the mortgagees to pay it as alleged; denies that he was informed immediately after the purchase of Drumright of the land in controversy, and says that he knew nothing of it and had no notice whatever of it until after he had instituted his attachment proceedings about 21st October, 1873; denies Drumright's title, or that his deed was acknowledged or recorded at that time, and denies that the consideration for the deed was a valid one, and demands proof; denies that it was sent to Tallahassee for record, as alleged, immediately after it was executed. He alleges that he did attach the land on 21st October, 1873, and obtained judgment in February, 1876, and at a sale under execution thereon he purchased it in May, 1876, and insists that he was a purchaser for a valuable consideration. The judgment was obtained for about $1,100 for money loaned by him to Thomas in 1872, for which he held Thomas' due bill for $1,000 unsecured; denies that he had notice of any proceedings in bankruptcy on the part of Thomas or by his creditors, and received no notice as a creditor or otherwise pending such bankruptcy proceedings; demands proof of such proceedings and the date thereof; alleges that the assignees of Ketchum & Hartridge duly sold and assigned the mortgage to him for $600 and interest which was paid by him; denies the right of Drumright to any of the rents and profits, and says the deed to Drumright is void; prays that Drumright's answer and cross-bill be dismissed, and for relief upon his bill of foreclosure as therein prayed.

John G. Thomas was sworn as a witness for defendants. He testified that he made and executed a deed to Wm. P. Drumright of the lands described, *dated* on or about 15th March, 1873. The consideration was $2,910. Witness re-

sided in Dooley county, Ga., and Drumright in Macon county, Ga. Drumright had loaned me money at various times until the amount reached $2,800, which I was anxious to pay, and sold the property to him for the amount I owed him and a note he held against my brother, which made the foreclosure money $2.910. Thomas W. Carr was agent in charge of the place at the time. In July or August, 1872, I met Carr and informed him of the sale to Drumright, and asked him to continue the supervision of the place until Drumright could come over. Carr asked me the price obtained. I believe it was neglect on Drumright's part in not having had his deed promptly recorded. Wm. A. Carr, witness' father-in-law, conveyed the property to witness so that it could be sold to pay off his debts, and for that purpose. Witness filed his petition in bankruptcy, February 28th, 1874, and received his discharge in June, 1875. Thomas W. Carr's debt against me was duly set forth in the schedule of debts, and I was discharged therefrom. I had got $600 from Ketchum & Hartridge, which was secured by mortgage on the Florida land. This $600 debt was reduced to $275 by shipment of cotton to K. & H. by Thomas W. Carr from the Florida place. This was credited on the books of K. & H. I was informed by their legal adviser and business agent that the shipment had reduced the mortgage to $275.

On cross-examination he testified that the deed to Drumright was delivered *as soon as executed.* Does not remember the names of the witnesses to the deed. We agreed on terms, the deed was made and given, the evidence of my debt surrendered, and a small note of my brother given me.

Question—State particularly what constituted the sale.

Answer—"I think the full answer already given is an answer to this, but will say the agreement of the purchaser,

Drumright, and witness, the making and passing the deed to said purchaser of my notes due him and the note he held on my brother constituted the sale." I informed complainant, Thomas W. Carr, that I had sold the place. Information was given said Carr by word of mouth in Athens, Ga., in the summer of 1873. I told him I had sold the land. Carr told me during my visit at that time to Athens that I must pay him the interest the coming season, which I told him I expected to do. Am positive I never mentioned the Ketchum & Hartridge mortgage to him. I don't remember who mailed the deed to Florida for record. Suppose it must have been Drumright, as it was his deed and in his possession. Don't know when the deed was sent to Florida for record, but think it was sent *as soon as I learned of Carr's attachment*, and informed Drumright of the same Thomas W. Carr knew that the titles to the property were given to me by his father for the express purpose of selling the same to relieve me of pecuniary embarrassments.

This is the substance of the oral testimony. The deed executed by John G. Thomas, of Dooley county, Ga., to Wm. P. Drumright, of Macon county, Ga., was put in evidence. It bears date of March 15, 1873, witnessed by G. T. Bell, and A. J. Hamilton, J. P. The acknowledgment in Dooley county, Ga., was taken September 22, 1874, and it was recorded October 8, 1874, in Leon county.

The cause was brought on to be heard before the Judge of the Third Circuit at Madison, and a decree was made July 9, 1881, to-wit:

1. That the plea of Thomas W. Carr to the cross-bill be overruled.

2. That the deed from the sheriff of Leon county to Thomas W. Carr dated May 15, 1876, in pursuance of a sale under an execution issued upon a judgment in an attachment suit of Carr against Thomas is null and void as

against the deed of Thomas to Drumright dated March 15, 1873.

3. That said William P. Drumright has the right of entry and possession of the real estate mentioned, and that he recover of and from Thomas W. Carr the mesne profits thereof since March 15th, 1873, Carr having been in possession, the mesne profits to be hereafter ascertained.

4. That Carr deliver possession to Drumright.

5. That the bill of foreclosure, &c., be reserved for further consideration.

J. T. Bernard and *D. S. Walker, Jr.*, for Appellant.

R. B. Hilton for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

This case is peculiar in some respects because it embraces a suit in equity to foreclose a mortgage by complainant and a suit at law in ejectment by one of the defendants against the complainant, who is in possession of the premises, claiming title by virtue of an attachment lien, judgment and execution, and a sale and deed from the sheriff.

Nothing was determined by the decree except the title to the land as between the defendant, Drumright, who claims under a deed from Thomas, his co-defendant, and the complainant, who claims under his attachment lien, judgment and execution.

The foreclosure proceedings remain undisposed of. The only issue determined was as to the several legal titles of Carr, the complainant, and Drumright.

Waiving the question of equitable cognizance of the dispute as to the legal title, we proceed to examine the correctness of the judgment as to the title, and the grounds of error alleged upon the pleadings.

Carr filed his bill to foreclose a mortgage executed by

Thomas to Ketchum & Hartridge, of Savannah, who went into bankruptcy, and their assignees, as is claimed, assigned the mortgage to Carr. Drumright, who holds a deed from Thomas, had commenced his action of ejectment against Carr (who is in possession, claiming title of the land,) before the institution of the foreclosure suit. The parties entered into an agreement to submit their whole matters of litigation to the chancellor to determine everything relating to the mortgage, the debt secured by it and the rights of the complainant thereto, and the question of title as between Thomas and Drumright. The statement of the case shows the respective claims of the parties. The record and pleadings in the ejectment suit are not included in this record, but the claims of the parties are set forth by cross-bill and the answer thereto by the original complainant, filed in the foreclosure suit pursuant to the stipulation of the parties. Thomas does not plead.

It is insisted by appellant, the complainant in the foreclosure suit, that a cross-bill cannot be filed after default entered. This point is not well taken for two reasons. First, there had been no default entered as against Drumright or Thomas; and second, the cross-bill was filed by consent of all parties, and embraces precisely what they agreed should be submitted to the court.

Appellant alleged as error the overruling of the demurrer to the cross-bill. The ground of demurrer is that the cross-bill does not show any right, title or interest of Drumright in the land. We think it does. It alleges a purchase by Drumright, and a deed to him from the legal owner duly executed and delivered, the possession of the grantor by his agent, notice to Carr of the conveyance before the levy of his attachment, and alleges that the claim of Carr, under which he obtained the attachment and sheriff's sale, had been extinguished by Thomas' bankruptcy proceedings.

It goes further and alleges that the mortgage debt was paid. How a better title can be *alleged* we cannot understand. The demurrer was rightly overruled.

It is urged that the cross-bill introduces new matter not pertinent, and that it is multifarious, introducing matter and the rights of third persons not parties to the suit, and that therefore the cross-bill is demurrable. But no where in the record do we find any such questions raised by any pleading; (1 Dan. Ch. Pr. 3 Am. Ed., 352;) and, besides, the stipulation of the parties is broad enough to cover any fact or ground of action or defence affecting the rights of either party. The cross-bill was evidently designed and intended by both parties as a bill of peace, according to the stipulation.

It is unnecessary to consider here the questions supposed to be raised upon the overruling of the plea, as the matter is elsewhere disposed of.

The material questions are whether Carr's claim and his attachment lien were extinguished by the supposed proceedings in the matter of the bankruptcy of Thomas; whether Drumright had a valid deed of conveyance of the land, and whether Carr had notice of such conveyance at the time of the levy of his attachment.

As to the effect of the bankruptcy proceedings, the appellant discusses it very briefly, and appellee does not allude to it. He therefore does not consider it important. We find, however, by looking at the act of Congress of March 2, 1867, relating to bankruptcy, that the title of the bankrupt's property is vested in the assignee by the assignment and conveyance by the register, and that the same operates "to dissolve any attachment made within four months next preceding the commencement of the proceeding." There is no record evidence that any such proceedings were had. The cross-bill fails to show when they

were had. Carr denies any notice or knowledge of any such proceedings, and demands due proof. There is no evidence whatever that any assignment in bankruptcy was ever recorded in Leon county, Fla., as required by Sec. 14 of the Act of 1867.

From the answer to the cross-bill, and from the testimony, we learn that the writ of attachment was obtained and levied on the land October 21, 1873, and that the proceedings in bankruptcy were commenced by the filing of Thomas' petition February 28, 1874, more than four months after the levy of the attachment. It does not appear that any obstacle whatever was interposed byThomas or others against the prosecution of Carr's claim to judgment and execution, and that judgment stands unreversed. The bankrupt act did not displace the lien of the attachment. Thomas' legal title, as appeared of record, was levied upon by the attachment and sold.

If Thomas had any interest in the land at the date of the bankruptcy assignment it would doubtless have passed, by proper proceedings, to the assignee, subject to the attachment lien, as we understand the act of Congress. But if Thomas, at the time of filing his petition, had in good faith conveyed to Drumright, there was no interest in him which he could assign, and none vested. (See §35, Bankrupt Act of 1867.)

We cannot conclude that any bankruptcy proceedings were had to affect Carr's attachment suit. This controversy is between Drumright as the grantee of Thomas and Carr as an attaching creditor during priority of an unrecorded deed, and these are matters depending upon the statutes of Florida. The issue is made by the cross-bill and the answer.

It is urged by counsel for appellees that the deed of Thomas to Drumright is void as to him as a subsequent purchaser, by force of Sec. 5 of Chap. 1939, Laws of 1873.

(found in McClellan's Dig., 219, Sec. 20.) The section reads thus: "Every conveyance of real estate within this State hereafter made, which shall not be recorded in the county in which the lands are situated within six months after the execution thereof, shall be void as against any subsequent purchaser."

The title of the act in which the section is found is: "An act providing for the acknowledgment of deeds and other conveyances of land." Section 14 of Article IV. of the Constitution reads thus: "Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which *subject* shall be briefly expressed in the title."

We are loath to pronounce any act of deliberate legislation to be invalid, but when an act like this, which in effect is promotive of fraud in various ways, comes before us we feel no reluctance in declaring its invalidity, if there is ground for so doing. The section in terms gives to a second purchaser or grantee of land from the former owner a good title against a former grantee who has bought and paid for the land, though the second purchaser may know of the former conveyance, if the first deed is not recorded within six months after its execution. As to the second deed the first is declared void, absolutely, in law, if recorded after six months, and though the second is executed after the recording of the first. A provision so mischievous in its effects can hardly be said to have been deliberate legislation. The *title* of the act shows its purpose to be a regulation of the "*acknowledgment* of deeds and other conveyances of land." The *subject* of the fifth section is a declaration of the effect of omitting to *record* a conveyance. The one subject does not embrace or have any proper connection with the other. The result is that the said fifth section is void by the terms of the Constitution, which prohibits leg-

islation upon one subject under the guise of an act relating to another object and purpose. For a general discussion of the subject we refer to Cooley's Constitutional Limitations, 81, 83, 141, 150, and the authorities there cited.

If, therefore, we may treat Carr as a subsequent purchaser, it cannot be well claimed by him that the failure to record the deed to Drumright within six months gives him any advantage by reason of the fifth section of Chap. 1939.

The question then arises as between Drumright, who claims under a deed dated March 15, 1873, but not recorded until October 8, 1874, and the title of Carr by his attachment levy of October 21, 1873, under which he obtained the sheriff's deed, to be determined by the recording acts.

The statute provides that "no conveyance, transfer or mortgage of real property, or of any interest therein, shall be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same shall be recorded in the office assigned by law for that purpose;" and to entitle it to be recorded it must be duly proved or acknowledged. Act November 15, 1828, McC.'s Dig., 215, §6.

The service of a writ of attachment binds the property attached except against pre-existing liens. Act February 17, 1833; McC.'s Dig., 114, §18.

Already at this term we had occasion to examine the effect of the above section of the recording act. (Massey vs. Hubbard.) The conclusion to which we arrived in that case we believe to be the correct construction of that section. If a deed of conveyance be executed and delivered, though not recorded, an attaching creditor or subsequent purchaser without notice of the prior conveyance will have preference of the unrecorded conveyance. This is the rule in Alabama, New Jersey and other States where the lan-

guage of the statute is like that of ours in substance and effect. We will not here further discuss the subject, but refer to Massey vs. Hubbard, and to the notes and citations to Bassett vs. Nosworthy, Vol. 2, part 1, Leading Cases in Equity, Am. Ed. 1877. See also Thompson vs. Maxwell, 16 Fla., 773, 781.

The cross-bill alleges that Thomas conveyed to Drumright by deed dated March 15, 1873, and that Carr was immediately thereafter notified of the same. Carr, in his answer on oath, positively denies having had any notice thereof before he sued out his attachment October 21, 1873. The only evidence on the subject of notice is that of Thomas who says that he told Carr at Athens, Ga., "in July or August, 1873, of the sale to Drumright, and asked him to continue the supervision of the place until Drumright could come over." He says further: "I don't remember who mailed the deed to Florida for record. Suppose it must have been Drumright, as it was his deed and in his possession. Don't know when the deed was sent to Florida for record, but think it was sent *as soon as I learned of Carr's attachment,* and informed Drumright of the same." The acknowledgment of this deed was taken September 22, 1874, in Georgia, and the recording was October 8, 1874.

No other proof was made as to the notice, and no circumstances are shown tending to establish the fact of notice or knowledge on the part of Carr that the land had been sold or conveyed by Thomas to Drumright. It was shown by Thomas that the property had been conveyed to him by his father-in-law for the purpose of aiding Thomas to pay his debts, and that Carr knew of this fact. This latter fact does not tend to show that Carr had notice of the conveyance to Drumright. If Carr knew that the property had been given to Thomas to enable him to pay his debts, Carr doubtless supposed himself as strongly entitled to payment as any other creditor.

The rule is that where the parties proceed to a hearing all the allegations of the answer which are responsive to the bill shall be taken as true, unless they are disproved by evidence of greater weight than the testimony of a single witness. 1 Dan. Ch. Pl. & Pr., Cooper's Ed., 843, and notes; 5 Fla., 478; ib., 528-9; 10 Fla., 9.

The answer having denied in emphatic terms the allegation of notice charged in the cross-bill, and there having been no testimony other than that of the defendant, Thomas, to that fact, we cannot consider it proved that Carr at the time of levying his attachment had notice of the sale or conveyance.

We notice also that in his testimony Thomas does not testify that the deed was in fact executed and delivered on the day it bears date. He speaks of the deed *dated* March 15, 1873, but the record shows that in his examination he always avoids stating *when* it was executed and delivered, though his attention was specially directed to the time of its execution by the cross-interrogatories. This, together with the fact that he testifies that the deed was sent for record when *he notified Drumright* of Carr's attachment, would seem to create a slight cloud of suspicion over the integrity of the transaction.

On the whole case it does not appear that Carr had any notice of the conveyance to Drumright, either express or implied, actual or presumptive, at the time his writ of attachment was levied, and under the statute his lien takes priority to the deed.

The result is that, as the case here stands, there was error in holding that the deed of Thomas to Drumright gave the latter a better title than that of Carr under the sheriff's deed.

The decree must therefore be reversed, and the cause remanded for further proceedings.

CHARLES D. TUTEN, APPELLANT, VS. NATHAN GAZAN, APPELLEE.

1. No objection can be urged in the Appellate Court to the evidence given in the court below, except as to its sufficiency, unless objection was there made when it was received.
2. Certified copies of record and papers lawfully left in the office of the Secretary of State are, by statute, made competent evidence, as the originals would be.
3. When testimony is received without objection it is considered as received by consent.
4. The statute laws of other States must be proved before the courts of this State like other facts or evidence.
5. When the time for taking testimony in chancery causes has expired by the rules, it is within the sound discretion of the court to extend the time upon good cause shown.
6. The acknowledgment of deeds and other writings before a Commissioner appointed by the Governor to take acknowledgments, &c., in other States within the United States, are not required to be certified by him under an official seal, his private seal only being required by the statute.
7. Where the officer taking an acknowledgment of a deed styles himself such in his certificate, that is *prima facie* evidence of the fact that he is such officer.

Appeal from the Circuit Court for Madison county.

The facts of the case are stated in the opinion.

W. C. McCall for Appellant.

H. J. McCall and *C. W. Stevens* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This was a bill in equity to foreclose a mortgage upon personal property filed by appellee. The bill shows that Tuten, at Quitman, Georgia, made his note to Gazen for fifty dollars, with interest, and "ten per cent. attorney's fees if legal proceedings are commenced for collection."

Tuten, at the same time, executed a mortgage upon horses and other stock to secure payment of the note, which was given for plantation supplies, as well as to secure the payment of such other advances as Gazan "may make to the party of the second part during the present year," (1881,) and advances were so made to the amount of $270.13, as per account annexed, of which there remains due $167.43, including the note. The answer admits the execution of the note and mortgage, but says the mortgage is not a lien upon the property, because the acknowledgment thereof was taken in Georgia before one Thrasher as a Commissioner appointed by the Governor of Florida, but that his commission was vacated by his removal to Florida; and, further, that the certificate of acknowledgment is not attested by his official seal, and, therefore, the mortgage could not legally become a lien, and is of no binding force. Further, that the note has been fully paid. It alleges, also, that the account of goods and advances annexed to the bill is not correct, as some of the articles charged therein were not purchased by him, or by his authority; that complainant is a merchant in Georgia, where the account was made and contracted so far as it was made, and complainant did not have his weights and measures tested and marked by the ordinary of the county, wherefore he is not entitled to a judgment or decree upon said account. Replication was filed.

The testimony contained in the depositions of complainant and his clerk proved the account to be correct, and that defendant had promised to pay it. The note and mortgage were put in evidence. The certificate of the acknowledgment of the mortgage had the private seal of the Commissioner annexed, and stated that he had no official seal. A copy of the Commissioner's official commission, certified by the Secretary of State, was also introduced and received

in evidence. No testimony was offered by the defendant. A decree was rendered for the amount due as claimed in the bill and established by the evidence, and directing a sale of the property, and defendant appealed.

The appellant alleges as error that the note and mortgage were admitted in evidence against his objection. Not only were the execution of the note and mortgage admitted by the answer, but no objection appears in the record to their introduction as evidence.

Appellant claims that the certified copy of the commission of Thrasher, the Commissioner of Deeds, was improperly admitted in evidence after objection thereto. Certified copies of books and papers lawfully kept in the office of Secretary of State are made competent evidence by statute as the originals would be. No objection to the paper being received as evidence appears in the record made by appellant.

It is claimed that the depositions of Gazan and his clerk were admitted in evidence notwithstanding appellant's objection thereto. No objection however appears by the record to have been made to the depositions. The objections now urged against them are that the commission to take the testimony was issued by the Judge and not by the Clerk; that the place of their execution does not appear therein, and that the interrogatories and testimony are not separate, but the answer to each interrogatory follows it in order.

The rule of law is, however, that where testimony is received without objection it is considered as received by consent. (2 Greenleaf's Ev., §326; 3 Bibb, 86; 4 ib., 535.) No such objection can be urged in the Appellate Court that was not taken in the court below, except as to its sufficiency.

It is claimed further that complainant should have been

required to prove that his weights and measures had been tested and marked according to the laws of Georgia, and the decisions of the Georgia courts are cited to show that this should be proved by complainant before he could recover for goods sold by weight or measure. The court which tried this cause, however, could not know the laws of Georgia, unless they are proved in the manner pointed out by statute, (McClellan's Dig., 514,) or by the rules of the common law to make them evidence. 1 Greenleaf's Ev., §§480, 489.

The record does not show that there was any such proof before the Chancellor.

The appellant urges further that the court erred in refusing further time to take testimony, to-wit: to produce and prove a "pass-book" in his possession in which the complainant had entered from time to time the items of account of goods purchased by him from complainant, and that such pass-book would show that the complainant's account was not correct. The cause having been at issue since January 3, 1880, and the hearing being had in July, the time for taking testimony under the rules having expired, the court refused to allow further time, the pass-book having been in defendant's possession. The pass-book was not produced, nor was any reason given for not producing it.

The extension of time for taking testimony is in the sound discretion of the court, and we cannot say that this discretion was abused in this case. See Rules of the Circuit Courts in Equity, Rule 71.

Appellant insists that complainant having introduced evidence upon the hearing, he should be allowed further time to take testimony. We do not find that any testimony was offered by appellant upon the hearing, and it was not proposed by him to take any testimony to rebut

the documentary or record evidence produced by the complainant on the hearing, which evidence consisted only of the certified copy of the commission of the officer who took the acknowledgment of the mortgage, and which was put in evidence without objection.

Appellant insists that the mortgage was not valid for any purpose under the statute, which provides that "no mortgage of personal property shall be effectual or valid to any purpose whatever, unless such mortgage shall be recorded in the office of records for the county in which the mortgaged property shall be, &c., and mortgages of personal property shall be admitted to record upon being proved or acknowledged in the manner provided by law for the proof or acknowledgment of deeds, &c., of real property. The ground of the objection to this mortgage is that the commissioner who took the acknowledgment thereof did not affix thereto his *official* seal, and that a private seal or scroll with a pen is not sufficient.

The act of January 28, 1831, (found in McClellan's Dig., 285,) authorizing the appointment of commissioners to take acknowledgment of deeds, &c., in other States to be recorded in this State, requires the certificate to be made under *his seal*. It nowhere requires that the commissioner shall have an official seal bearing any device or of any particular character. Nor is there anything in any of the laws regulating the execution of deeds or other instruments or the proof thereof for record when the acknowledgment or proof is made before an officer appointed by the Governor of this State, except where a deed is executed in a foreign country. In that case the commissioner shall affix his "seal of office." (Ch. 1939, §2, Laws of 1873; McClellan's Dig., 218.) In the present case the act of 1831 requires the commissioner to certify the acknowledgment under his seal, which imports his private seal, and this he has affixed as appears by his certificate.

Where the officer taking the acknowledgment styles himself such an officer, as is authorized, that will be *prima facie* evidence of the fact of his being so. This is expressly decided in 4 Wash. C. C., 718; 1 Peter's C. C., 429; 2 Hammond, Ohio, 55; 4 Dana, Ky., 470; 2 Phill. Ev., 585, 4 Am. Ed.

The commissioner here signed the acknowledgment as follows: "In witness whereof I have hereunto set my hand and affixed my common seal, as I have not an official seal, the day and year first above written. J. S. Thrasher, L. S., Commissioner of Deeds for Florida in and for the State of Georgia." In the body of the certificate he describes himself as: "A commissioner duly appointed and authorized by the Executive authority of Florida under the laws of said State to take within the State of Georgia proof and acknowledgment of deeds, &c., to be used and recorded in said State of Florida." This was sufficient to authorize the recording of the mortgage.

The decree is affirmed.

ANTONIO SOLARY, APPELLANT, VS. HENRY C. HEWLETT, APPELLEE.

The actual use and occupation by the owner and his family of premises designed as a homestead, is essential to impress the property with that character. The mere intention, at some future day, to repair and occupy them as such, where such intention is not manifested by acts as well as words, is not sufficient.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion.

M. C. Jordan for Appellant.

Cockrell & Walker for Appellee.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The appellant filed his bill in chancery in the Fourth Judicial District asking that certain real estate of the appellee, claimed by him as a homestead, might be decreed not exempt as against a judgment lien of him, the said appellant.

The bill charges that this appellant, on the 20th day of November, 1879, commenced a suit by attachment against Balch and Hewlett, this appellee; that such attachment was levied upon the property of Hewlett, being lot No. 4, in block 51, in the City of Jacksonville, there being no partnership property of the firm to be found in the county; that appellant recovered judgment in said suit in January, A. D. 1880; that execution was duly issued upon the same, and that the property theretofore attached was levied upon and advertised for sale; that subsequent to such advertisement of the property for sale under and by virtue of the execution Hewlett filed in the office of the County Judge his statement, containing a description of said property, claiming such property as his homestead, and demanded of the sheriff that the same be released from the levy; that the sheriff did release the property from the levy, and refused to sell the same. The appellant claims that such property is not exempt as a homestead, and charges that it was purchased before the contraction of the debt upon which the judgment was founded; that the property never has been occupied as a dwelling place or place of business by Hewlett; that it contains three dwelling houses, which have been leased to and occupied by tenants ever since such purchase by him; that the lot contains less than one-half acre, and that Hewlett lives upon other premises, the property of his wife.

The appellee (Hewlett) in his answer admits the recovery

of the judgment, the issuing of execution thereon, and the interposition of the claim of exemption as set up in the bill. He alleges that he has a wife and four children; that from his savings as a day laborer he purchased said property, and at that time he owned no lands, and had not personal property, including such savings, to the amount of one thousand dollars; that he purchased it with the openly-avowed intention of making it a home and residence of himself and family; that it was not in a condition of repair suitable for a residence, but that he intended to make the necessary repairs and occupy the premises as a homestead as soon as his means would admit. He alleges that his occupation of other premises is temporary and subsidiary to the purpose of acquiring a home on lot 4, block 51. He further says that prior to the levy, as set up in the bill, he had not set apart or selected any homestead by statement in writing, as authorized by law; that he did not at the time of the levy, nor does he now, own any other lands or lots than the lot now claimed as a homestead.

The cause was heard on the bill and answer, and the court made a decree in the words following: "It is ordered and decreed that the said described lot number four, in block fifty-one, and a dwelling house situated thereon, suitable for the residence of the defendant and his family, together with the outbuildings properly appertaining to the same, be and the same are hereby set aside as the homestead of the said Henry C. Hewlett, and declared exempt from levy and sale under said execution."

From this judgment of the court this appeal is brought, and the appellant assigns, in his petition of appeal, the following errors:

1. That no part of the property under the case as made by the pleadings was exempt according to the true intent and meaning of the Constitution and laws of Florida.

CHARLES D. TUTEN, APPELLANT, VS. NATHAN GAZAN, APPELLEE.

1. No objection can be urged in the Appellate Court to the evidence given in the court below, except as to its sufficiency, unless objection was there made when it was received.
2. Certified copies of record and papers lawfully left in the office of the Secretary of State are, by statute, made competent evidence, as the originals would be.
3. When testimony is received without objection it is considered as received by consent.
4. The statute laws of other States must be proved before the courts of this State like other facts or evidence.
5. When the time for taking testimony in chancery causes has expired by the rules, it is within the sound discretion of the court to extend the time upon good cause shown.
6. The acknowledgment of deeds and other writings before a Commissioner appointed by the Governor to take acknowledgments, &c., in other States within the United States, are not required to be certified by him under an official seal, his private seal only being required by the statute.
7. Where the officer taking an acknowledgment of a deed styles himself such in his certificate, that is *prima facie* evidence of the fact that he is such officer.

Appeal from the Circuit Court for Madison county.

The facts of the case are stated in the opinion.

W. C. McCall for Appellant.

H. J. McCall and *C. W. Stevens* for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This was a bill in equity to foreclose a mortgage upon personal property filed by appellee. The bill shows that Tuten, at Quitman, Georgia, made his note to Gazen for fifty dollars, with interest, and "ten per cent. attorney's fees if legal proceedings are commenced for collection."

Tuten, at the same time, executed a mortgage upon horses and other stock to secure payment of the note, which was given for plantation supplies, as well as to secure the payment of such other advances as Gazan "may make to the party of the second part during the present year," (1881,) and advances were so made to the amount of $270.13, as per account annexed, of which there remains due $167.43, including the note. The answer admits the execution of the note and mortgage, but says the mortgage is not a lien upon the property, because the acknowledgment thereof was taken in Georgia before one Thrasher as a Commissioner appointed by the Governor of Florida, but that his commission was vacated by his removal to Florida; and, further, that the certificate of acknowledgment is not attested by his official seal, and, therefore, the mortgage could not legally become a lien, and is of no binding force. Further, that the note has been fully paid. It alleges, also, that the account of goods and advances annexed to the bill is not correct, as some of the articles charged therein were not purchased by him, or by his authority; that complainant is a merchant in Georgia, where the account was made and contracted so far as it was made, and complainant did not have his weights and measures tested and marked by the ordinary of the county, wherefore he is not entitled to a judgment or decree upon said account. Replication was filed.

The testimony contained in the depositions of complainant and his clerk proved the account to be correct, and that defendant had promised to pay it. The note and mortgage were put in evidence. The certificate of the acknowledgment of the mortgage had the private seal of the Commissioner annexed, and stated that he had no official seal. A copy of the Commissioner's official commission, certified by the Secretary of State, was also introduced and received

in evidence. No testimony was offered by the defendant. A decree was rendered for the amount due as claimed in the bill and established by the evidence, and directing a sale of the property, and defendant appealed.

The appellant alleges as error that the note and mortgage were admitted in evidence against his objection. Not only were the execution of the note and mortgage admitted by the answer, but no objection appears in the record to their introduction as evidence.

Appellant claims that the certified copy of the commission of Thrasher, the Commissioner of Deeds, was improperly admitted in evidence after objection thereto. Certified copies of books and papers lawfully kept in the office of Secretary of State are made competent evidence by statute as the originals would be. No objection to the paper being received as evidence appears in the record made by appellant.

It is claimed that the depositions of Gazan and his clerk were admitted in evidence notwithstanding appellant's objection thereto. No objection however appears by the record to have been made to the depositions. The objections now urged against them are that the commission to take the testimony was issued by the Judge and not by the Clerk; that the place of their execution does not appear therein, and that the interrogatories and testimony are not separate, but the answer to each interrogatory follows it in order.

The rule of law is, however, that where testimony is received without objection it is considered as received by consent. (2 Greenleaf's Ev., §326; 3 Bibb, 86; 4 ib., 535.) No such objection can be urged in the Appellate Court that was not taken in the court below, except as to its sufficiency.

It is claimed further that complainant should have been

made by them, which mortgage covered lot 2 in square 22 in Jacksonville. The note bore interest at twelve per cent., payable semi-annually. Alexander died in March, 1879. The first six months' interest was paid by appellants when due. The foreclosure suit was commenced in September, 1879.

The answer of Mrs. Mattair shows that the note and mortgage were given to secure the purchase-money of the west half of lot 2 in block 22, she at the time owning the east half of lot 2 and resided thereon. She says that she gave the note and mortgage upon the assurance by Alexander that in a very short time a relative of his would come on who would purchase the whole lot for eleven thousand dollars, thus leaving her $8,000 for her property in the east half, and relieve her of the debt, and that if his relative did not so come he, Alexander, would buy the whole property as soon as he could arrange some matters in hand. That it was by reason of this assurance that she consented to buy of him the west half of the lot, and but for that promise she would not have purchased and given the note and mortgage. She further says that the said west half so purchased at $3,000 was not and is not worth that sum, and she has been at all times willing to convey the property for the price Alexander proposed to pay for it, and was ready and willing to reconvey the property so purchased to Alexander in his life time, and is ready and willing to convey it to his administrator, and she prays that the court decree such reconveyance, and that the note and mortgage be cancelled, or that the entire lot be conveyed to the administrator for the sum of $11,000 according to the agreement with Alexander.

Samuel R. Mattair answers admitting the giving of the note and mortgage, but says that at the time of their execution and acknowledgment by him he was so drunk from

the free use of intoxicating liquors that he was deprived of his reason and will and was wholly incapacitated for business and (3) continued in such state until after Alexander left the State.

He alleges (4th) that most of the intoxicating liquors used by him, and from which he became intoxicated, were furnished by Alexander.

[5.] That but for such intoxication he would not have consented to the execution of the note and mortgage for $3,000, and he denies having paid the $180 interest to Alexander in his life time.

[6.] That in January, 1879, on Alexander's return to Florida, defendant called on him at Brooklyn and urged him to cancel the mortgage and note, on account of his (defendant) condition of intoxication at the time of the transaction, and proposed that he and his wife would reconvey to him the lot, and Alexander agreed to this proposition.

[7.] That Alexander having been taken sick defendants both visited him and made the same proposition, and Alexander promised to go to Jacksonville as soon as he could and make all things satisfactory. This was eight days before his death.

[8.] That he (Mattair) never admitted the validity of the note and mortgage, but at all times repudiated them as the offspring of an unfair advantage taken of him while he was incapacitated from doing business by reason of intoxication.

[9.] That the note and mortgage were given for the purchase-money of the west half of lot 2, block 22, and for no other consideration; and that said half lot was not worth $3,000.

[10.] That he is, and always has been, ready and willing to convey the half lot to Alexander in his life time, and to

the administrator since his decease, and prays that the court will decree such conveyance and the cancellation of the note and mortgage.

The answer of Mrs. Mattair was excepted to, save so much as admits the giving of the note and mortgage for the purchase-money of the half lot, and the exceptions sustained upon the ground of impertinence.

The answer of S. A. Mattair, as to so much thereof as is indicated by the foregoing numbers in brackets [3, 4, 5, 6, 7, 8, 9, 10,] was excepted to, and the exceptions to paragraphs numbered 3, 4, 6, 7, 9, 10, were overruled, and the exceptions to the paragraphs numbered 5 and 8 were sustained. The remaining portions of the answer were put in issue by general replication.

The complainants gave in evidence the note and a certified copy of the mortgage. Some questions were raised as to the introduction of the copy, and before the cause was submitted the original mortgage was filed in evidence. It was also proved that the first instalment of interest was paid by defendants when it became due, and Mr. Greely testified that Mr. Mattair said to him that the endorsement of payment of the interest was made on the note by Mattair himself. Several witnesses testify that at the time the note and mortgage were executed by Mattair he was so much intoxicated he was incapable of doing business intelligently, and had been in that condition for some time before and after that day.

Mrs. Mattair testified to sundry conversations with Mr. Alexander relating to the bargain and the inducements leading to the purchase by her and the giving of the mortgage, and also subsequent conversations in reference to an arrangement.

The cause having been submitted to the court, a decree was made that the defendants pay the amount due on the

note and mortgage and the costs within eight days, and in default thereof that the entire property be sold to satisfy the same, and that the defendants be foreclosed of all equity of redemption, &c., in the usual form.

From this decree the defendants appealed.

The grounds upon which it is prayed that the decree should be reversed are (1 and 2) that the court erroneously sustained the exceptions to the answers of the defendants, as shown by the record; and (3) upon the ground that this was the mortgage of a married woman upon her separate property, and it does not appear that such property should be bound by it, the mortgage having been given to secure the note of a married woman and her husband, which, it is claimed, is void as to her; and (4) upon the further ground that the court did not take into consideration and give proper weight to the defence set up by the separate answer of Mrs. Mattair, and to the testimony in support of it; and (5) upon the further ground that the court did not consider and give proper weight to the defence of drunkenness and mental incapacity of Mr. Mattair, and in decreeing that he should pay any deficiency of the amount due after a sale of the property; and (6) in receiving a certified copy of the mortgage in evidence instead of the original; and (7) in giving a decree against a married woman personally for the payment of the debt; and in limiting the equity of redemption to eight days' time after decree.

C. P. Cooper for Appellants.

Geo. Wheaton Deans for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

We first consider the third ground assigned for error in the proceedings and decree, which is that the mortgage is

on the separate property of the wife to secure her note, which note is void as to her, and no proper allegations are made in the bill to show that her property should be charged.

This objection is not sustained by the record. The note was signed by her and by her husband. *Prima facie,* therefore it is a valid note of the husband. The act of February 4, 1835, (Th. Dig., 179,) provides that a married woman may sell, transfer and mortgage her real estate of inheritance as if she were sole and unmarried, her husband joining therein. This would seem to settle the question that she may bind her real estate to secure any valid indebtedness of herself and her husband. The case of Dollner, Potter & Co. vs. Snow, 16 Fla., 86, and Hodges and Wife vs. Price, 18 Fla., cited by appellants' counsel, do not apply to the circumstances of this case. The testimony and the answers of the defendants show that the note and mortgage were given to secure the purchase price of property conveyed to the wife.

The equitable rule is that any debt contracted by a married woman for the benefit of her separate estate or property is valid to the extent that it may be enforced out of any such estate or property, whether expressly secured by mortgage or not. Merritt vs. Jenkins, 17 Fla., 593, and Blumer vs. Pollak & Co., decided at the present term, and see Story's Eq. Jur., §1400, *et seq.*

The sixth error alleged is that the court overruled the defendant's objection to the introduction of the copy of the mortgage in evidence in lieu of the original under the circumstances of the case. The error, however, if any, was cured by the subsequent production of the original in evidence.

The seventh error is that the decree charges the married woman personally by substantially entering a judgment

against her to all intents and purposes a judgment at law, and in decreeing a limit of the equity of redemption to eight days from the decree.

This is an erroneous construction of the decree. It charges only the mortgaged property with the money due on the note and mortgage, and is not in terms, or in effect, a general judgment against her. It decrees that the defendants pay the money due in eight days, and if not so paid that the property may be sold to pay it, (in the usual form;) and, further, that the defendants be forever barred of all equity of redemption, &c.

This decree is not in any sense such a judgment as that an execution or other process can issue thereon against any property except that which is expressly mortgaged. The bar of the rights of redemption, &c., are effective only after the sale.

It is further urged that this debt is not the debt of Mr. Mattair, but that of Mrs. Mattair, he having signed it only "to consent," yet the decree concludes with a provision that execution may issue against Mattair alone for any deficiency after sale of the mortgaged property.

This note is the note of Mattair, and he is personally liable on it, even if Mrs. M. is not so liable; that it was given to "consent," or for the benefit of his wife, does not exempt him from such personal liability.

It is urged also that the bill does not pray a personal judgment for the deficiency, and, therefore, the decree in charging him with the deficiency is wrong. But it is not necessary that a prayer for a judgment, or execution for any deficiency, shall be made by the bill. The bill concludes with a prayer for other and further relief generally, and this is sufficient. Rule 89, regulating the practice in equity, authorizes a decree for any such deficiency, and provides that execution may issue therefor.

As to the several grounds assigned for a reversal of the decree other than those mentioned, to-wit: the sustaining of the several exceptions to the answer of the defendants; that the court did not give proper weight to the evidence and the answers, nor to the fact of the drunkenness of Mattair and his mental incapacity; they will be disposed of by what follows. It is proper to remark, however, that all the testimony of the defendants as to their transactions and conversations with Alexander before, at the time and after the conveyance and the note and mortgage were executed, is illegal and improper to be considered as evidence of such matters. They are prohibited by law from giving such testimony, Alexander being dead, unless the administrator has testified in relation thereto. All such testimony should be struck out by the court. See Chap. 1983, Sec. 1, Laws of 1874.

If Mr. Mattair was in such a state of intoxication at the time of the giving of the mortgage that he was incapable of transacting business intelligently, the contract on his part was voidable. Contracts by such persons are considered by the court in the United States as voidable, not void. Chitty on Contracts, 10 Am. Ed., 154, and notes citing a large number of authorities.

In this case, six months after the giving of the note and mortgage, the defendants voluntarily paid the interest due thereon. They are in possession of the lot conveyed to them by Alexander in consideration of the note and mortgage. They have not tendered a reconveyance of the lot, or done any act toward rescinding the bargain. If the defences set up shall be allowed, where are the parties? The bill is dismissed, thereby denying the right to foreclose the mortgage, and the defendants in the possession and enjoyment of the property conveyed to them, and which they have not paid for at the contract price or any other price.

And this demonstrates that these defendants should not be allowed to interpose by answer such defences as they have set up to the foreclosure of the mortgage.

Who seeks equity must do equity. The defendants cannot be allowed to keep the property obtained by the transaction and fail to fulfill their agreement to pay for it. Gore vs. Gibson, 13 M. & W., 623, 627.

The remedy of the defendants was to file a cross-bill or an original bill after tendering a reconveyance and otherwise doing equity, and obtaining a rescission of the entire contract. The agreement being voidable is yet binding upon the parties until set aside by proper proceedings. In Eddleston vs. Collins, 17 Eng. L. & Eq. R., 296, 300, this language is used: "The plaintiff's security is, I must now assume, well created by deed, and I rather apprehend such a security, if impeached at all, must be impeached by cross-bill. The security is good until impeached, and to allow the defendant to impeach it by her answer, and by evidence on her part, would be to make a decree in favor of the defendant upon the application of the plaintiff. If the defendant were at liberty thus to impeach the plaintiff's title, she must equally be at liberty wholly to subvert it; and the consequence of allowing this would be that plaintiffs coming to this court for relief might find themselves in a position of being decreed to convey to the defendants."

This court has several times enforced the rule that affirmative relief cannot be granted to a defendant against a plaintiff upon the mere answer of the defendant. See Wooten vs. Bellinger, 17 Fla., 298.

As to the matters set up by the answer of Mrs Mattair that she was induced by the golden visions held before her by Mr. Alexander as to the value she would realize for her whole property, and that his friend or himself would buy it from her at some future day, and that the property

bought by her under such influence was not worth what she had agreed to pay for it, the same rule is applicable. It was held in Sanborn vs. Osgood, 16 N. H., 112, cited by Jones on Mort., §625,) that a fraudulent misrepresentation as to the value of property sold by a mortgage, in payment of which he has taken a mortgage, does not avoid the mortgage if there is any value at all in the property sold. The property, which was the subject of the sale and mortgage, must first be restored to the vendor, or a reconveyance tendered, before the mortgage can be rescinded.

Where a party seeks to rescind a contract for fraud he must ask the aid of the court in a reasonable time, and be in a situation to restore to the opposite party whatever he may have received from him. 2 Gilman, 650.

In view of the circumstances disclosed in the record, we think the decree should be so modified as to direct the sale of the west half of the lot before selling the east half, which it seems is the home of the family, if the defendants so desire.

The decree is affirmed, and the cause remanded with directions that the court order the sale of the west half of the mortgaged premises before selling the east half thereof, in case the defendants so desire. The costs of this appeal and proceedings to be paid by the appellants.

C. A. FAIRCHILD ET AL., APPELLANTS, VS. LUCINDA [redacted] HOUSE, BY HER NEXT FRIEND, A. A. KNIGHT ET A[redacted] APPELLEES.

1. A case in chancery is as much pending for the purpose of hearing [redacted] motion for an injunction when the papers are in the hands of th[redacted] Judge of the Circuit Court as if they were in the Clerk's office [redacted] the Circuit Court of the county in which the case is brought. Th[redacted]

papers being this in the hands of the Judge of the Circuit Court, he may, upon petition, find that he is disqualified, and before service of subpœna pass an order transferring the case to another circuit. Cases of the City of Jacksonville vs. Dorman, 13 Fla., 390, and Swepson *et al.* vs. Call *et al.*, 13 Fla., 337, referred to and explained.

An appeal in chancery opens the whole case to the respondent, and while the appellant may restrict his grounds for a reversal to particular errors alleged, yet the respondent will prevail if upon the whole record the order appealed from is proper.

Where the wife seeks to enjoin a sale of her separate statutory property, under an execution sued out by the creditors of her husband against him, she should bring her bill in equity through a next friend, making her husband and the plaintiffs in execution defendants, but a failure to do so is no ground to dissolve an injunction or dismiss the bill. The sheriff is not a proper party to such bill. In such case she cannot interpose a claim at law, as she is not empowered by the Constitution or the statutes to give a bond which would bind her personally, either at law or in equity, and she cannot act through a next friend at law.

Such portion of the statutes as, anterior to the Constitution, rendered the wife's property conditionally liable to the debts of the husband, is repealed by Section 26, Article 4, of the Constitution, which creates an unconditional exemption for such debts.

The Constitution, when viewed with reference to antecedent legislation, fixes the rule of construction to prevail. (Article XV., Section 2.) It is that all acts of the General Assembly, * * * "*not inconsistent*" with its provisions or with any ordinance or resolution adopted by the convention framing it, are in force.

At the time of the adoption of the Constitution married women might acquire and own two species of property, "*separate estate*" proper, which was an equitable estate, regulated mainly by the deed which created it, and "*separate statutory property*," which, as to its incidents, was controlled principally by the statutes. The Constitution must be construed with reference to the existing law. The terms "owned by her before marriage, or acquired afterward, * * * shall be her separate property," (Article 4, Section 26,) are not "*inconsistent*" with the existence of the estates then recognized and known as "separate estate" and "separate statutory property," and they continue to exist as before, except that the conditional liability for the husband's debts is repealed.

7. The allegations in a bill, by the wife against the judgment creditors of the husband, that property levied upon by them as the husband's property purchased with her own means, and that she always was, and still is, the owner thereof, is a sufficient allegation of a separate property in her, and while, according to the rule prevailing in this State, she is to be held to full and strict proof of a separate property, the chancellor should in such case grant an injunction.

8. Where, in such cases, a motion upon affidavits before answer is made to dissolve such injunction, and the affidavit fails to deny such allegation of separate property, the injunction should not be dissolved, although, from the history of its acquisiton by the wife, as stated in the bill, irregularities of a character sometimes adopted to accomplish the fraudulent purpose of screening property from debts to which it is subject are apparent, as it is possible that they may be consistent with fair dealing, and may be thus explained.

Appeal from the Circuit Court for Alachua county, to which the case was transferred from St. Johns county.

The bill, as originally filed in this case, was brought by Lucinda M. House, a married woman, in her own name, and not by her next friend, against a judgment and execution creditor of her husband and the sheriff, who had advertised for sale property which she alleges was her property. This property, she alleges, was furniture and materials and articles appertaining to a boarding-house in St. Augustine called the "Sunnyside," of which she was the licensed keeper, the licenses, as appear by the evidence of the clerk issuing them, extended from the 27th March, A. D. 1880, to 27th March, 1882. She alleges that the judgment against her husband was rendered on the 21st December, 1875; that the execution was issued on the 3d of January, 1881, and that the levy was made on the 4th of November, 1881. The sheriff swears that it was on the 22d of October, 1881. She alleges that the sheriff made no legal levy, not taking possession of, or assuming or exercising any dominion over, the property.

That she and not her husband is now the owner of the

property; that she has been such owner for many years, and that her ownership was notorious; that the sheriff knew the fact, and he was so advised at the time of the attempted levy; that on the 16th day of December, A. D. 1878, her husband mortgaged this property to Walter Lyon to secure the payment of $2,985.27; that said property was, when mortgaged, her property; that this fact was well known to Lyon, and that in consequence thereof said mortgage was subsequently, and on the 14th April, 1880, assigned to her. In this connection reference is made to exhibit B. to her bill, which is an affidavit of Lyon to the effect that when House executed this mortgage he and his wife both stated it was her property, and that when the mortgage was assigned on the 14th April, 1880, it was assigned to her. (To this agreement B. F. Oliveros was a witness. It appears from his affidavit, filed after bill, that when he witnessed the instrument on the 14th April, A. D. 1880, the name of Lucinda House did not appear and was not in the assignment as assignee; that the paper was not filed for record until the 22d October, 1881, and her name has been inserted in said assignment when it was filed for record. The assignment is to Lucinda, to have and to hold the goods, &c., to *him and his heirs*. She then alleges a loan on the 27th January, 1876, to William Bradford of $3,000, and it appears that at that time a mortgage was executed to her by him for that sum, and that she assigned the mortgage to J. P. Harvard. She then alleges "that when she came to the State on or about October 28, 1868, she was possessed, in her own right and name, of moneys and other property to a larger amount than was or is invested in the purchasing of the furniture with which the said 'Sunnyside' is now, and has heretofore been, supplied; that from her own separate estate she purchased and became the owner of the furniture with which the said

'Sunnyside' is furnished, and has always remained the owner, and is still the owner thereof."

She then sets up facts which it is claimed show irreparable injury in the event the sheriff is not enjoined from taking possession of and selling the property, alleges inability to give the bond required of third persons who claim property levied on, and that she has good reason to believe that neither the sheriff nor his sureties are possessed of sufficient property above the exemptions allowed them by law to satisfy her in any judgment she might be able to recover against them for damages occasioned by a sale. She prays that the sheriff and the plaintiff in execution may be enjoined from further proceedings, for general relief, and for subpœna.

On the 21st November the bill, it appears, was presented to the Judge of the Fourth Judicial Circuit, and, on motion and petition of complainant's solicitor, the case was ordered transferred to the Fifth Judicial Circuit for Alachua county. On the 23d of November the papers are filed in the clerk's office of St. Johns county, and are transferred to and filed in the clerk's office for Alachua county on the 29th November, A. D. 1881. On the 25th November notice of motion for an injunction to be made on the 29th November, 1881, is served on defendants' solicitors. In the meanwhile a restraining order is granted until the hearing of this motion, and until further order of the court. On the 29th November, and before any copy is taken, the bill is amended by making A. A. Knight, as next friend of plaintiff, a party to the bill. On the 30th day of November, 1881, upon motion and affidavits and evidence, an order dissolving the restraining order and refusing an injunction, but permitting the bill to be amended, was made.

The evidence was a certified copy of the mortgage and assignment thereof already mentioned, an affidavit by the

sheriff that the levy he made was on the 22d October, 1881, and was accompanied with possession, and that upon his subsequently going to the house to remove the goods Thomas F. House gave him security for the forthcoming of the property, when he should require the same under the levy, a certificate of the Clerk of the Circuit that there is no record in his office showing the names of the sureties upon the bond of the sheriff, and that the tax-books show assessment against the sheriff to the value of $200, a statement showing that House was assessed for personal property valed at $1,100, and for real estate $4,000, a certificate that there was no return of any personal property belonging to Mrs. House, a certificate of the clerk to the effect that there is no inventory or schedule of property, real or personal, belonging to Lucinda M. House recorded or on file in his office, and a certified copy of the *fi. fa.* under which the levy was made.

Upon the evidence recited the injunction was, on the 30th November, refused as stated. On the 2d December Thomas F. House and Lucinda M. House, by her next friend A. A. Knight, filed an amended bill.

The bill alleges that since the hearing on the 29th November Lucinda M. House has made and tendered her bond with good and sufficent sureties as required by law in cases of claims by persons claiming property levied upon; that the sheriff refused to accept the bond; that thereupon she and her husband tendered a like bond complying with the law in such cases which was likewise refused; that upon subsequent order given by this court and telegraphed to him the sheriff refused to accept a bond and threatens to sell the property.

Plaintiffs prayed an injunction. The injunction was allowed, and from this order, and from the order allowing the amended bill, this appeal is taken.

C. M. Cooper and *Fleming & Daniel* for Appellants.

Taylor & Sanchez and *A. A. Knight* for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The first question to be determined in this case is whether the Circuit Court of the Fifth Judicial Circuit had jurisdiction.

On the 21st November the bill was presented to the Judge of the Fourth Judicial Circuit, and on motion and petition of complainants, the Judge adjudicating and finding that he was disqualified, directed a transfer of the case to the Fifth Judicial Circuit. On the 23d of November the papers were filed in the clerk's office of St. Johns county in the Fourth Circuit, and from thence was transferred to and filed in the clerk's office of Alachua county in the Fifth Judicial Circuit. It is objected that the bill was not filed in the office of the Clerk of the Circuit Court for St. Johns county before the order of the Judge of that Circuit was made transferring the cause.

A case in chancery under the present practice is as much pending in the Circuit Court where the papers constituting it are in the hands of the Judge as if they were in the clerk's office, and it has been the practice of every Circuit in the State to treat a cause as pending for the purpose of hearing and granting or denying motion for an injunction before filing the paper with the clerk or service of process. Here such an injunction was prayed for, and the Judge practically denied the motion by holding that he had no jurisdiction, and upon petition suggesting disqualification and his finding such disqualification he orders the transfer. The case was, therefore, not only pending but pending for judicial action, so far as the matter of granting or refusing an injunction was concerned. The act of November 7,

1828, provides that "the Circuit Courts shall always be open for hearing and deciding motions, *presenting, arguing and deciding upon petitions granting injunctions* and passing interlocutory orders and decrees." In this case there were interlocutory orders made at chambers. They were authorized by the statutes and the rules, which provide that all motions for rules or orders or other proceedings which may not be granted of course may be made at any time before the Judge of the court. Rules 2 to 5, Chancery Practice.

These conclusions are not in conflict with the cases cited from 13 Fla.. 390 and 337. In the first case the act of 1851, Chap. 373, was controlled in its construction by the section of the Code which provided that an action was commenced by service of summons. Now the Code being repealed, we must construe it with reference to the statutes and rules controlling chancery practice.

In the second case what is said as to papers being filed in the clerk's office was said in reference to the provisions of section 3 of that act which expressly required the papers to be forwarded to the *"Clerk"* of the Court to which the cause was ordered transferred. It is not denied that this section has been complied with in this case. In the last case the Judge failed to find that he was disqualified in the order transferring the cause. That was the reason for a want of jurisdiction in the Columbia Circuit Court.

The Circuit Court of the Fifth Judicial Circuit having thus, as we think, jurisdiction, the next question which is suggested, and which it is proper to determine, is the extent to which this appeal opens the case for our consideration.

While the appellant here assigns the improper filing of the amended bill and its insufficiency as grounds for the reversal of the order awarding the injunction, and seeks only to set aside that order and the order allowing the

amendment, still the respondent, if he so desires, may go into the whole case. 4 Fla., 359; 16 Wend., 61, 85; 5 Paige, 296; 8 Cow., 338; 1 Beasley, 312.

Postponing the consideration of the questions arising upon the record as to parties and as to matters of practice, we enquire what is the case made by the original and amended bill.

It presents several different aspects:

First. It is a bill by the wife to enjoin the sale of her property levied upon to pay her husband's debts.

Second. A bill seeking an injunction to restrain a sale of the personal property of a third party on account of irremediable injury where damages at law would not be adequate compensation. In other words, a bill asking relief in equity because there was no complete adequate and full remedy at law for the damage threatened.

These equities are asserted in the original bill.

And third. A bill to restrain execution of legal process. upon the ground of insolvency of the sheriff and his sureties, and the further ground that the action of the executive officer is contrary to law. In other words, a refusal of legal rights. This is asserted as the basis for equitable relief in the amended bill.

The first questions presented are therefore as to the jurisdiction of a court of equity in the cases stated. As to the jurisdiction of a court of equity in this State in the case first stated, that is to enjoin the sale of the wife's property when assaulted by a creditor of the husband, there can be no question.

As to its jurisdiction in the second case it is unnecessary to determine here, because the wife's equity arises out of her relation as wife, and her equities exist independent of any questions which might arise in the case where the levy was made upon the property of a third person not invested

with the equities of a married woman in reference to such property. In the case of a third person not a *feme covert* it has been held that he would be required to show that the property was of such character or possessed of such peculiar value or interest to the owner that he could not be compensated by damages at law, while in the case of the wife all she has to show is that it is her property. Peculiar value, special interest and such things do not control her equitable rights in this respect. For this reason all of the original bill in this case which sets up or attempts to set up a peculiar value in the chattels levied upon is surplusage and unnecessary so far as the question of jurisdiction is concerned.

As to the third equity. Restraining legal process against one person because an insolvent officer is proceeding to enforce it against another without regard to the legal rights of this other. The consideration of this question involves the determination of the extent of the legal right of the third person, because if no such legal right of the third person exists no such enquiry can arise. In other words, in this case whether the wife has the right at law either with or without her husband to interpose a claim to property levied upon as her husband's and to prosecute such a proceeding at law.

The determination of this question involves to some extent a consideration of the subject of the wife's separate estate and her statutory property in this State. Our consideration of this subject will also necessarily involve in this case (for it is here raised) the question whether the constitutional exemption of the wife's property from liability to the husband's debts repeals that portion of the statute which renders it liable, not absolutely, but "*as if the act had not been passed,*" in the event it is not inventoried and recorded as required by the statute.

The property here claimed by the wife is goods and

chattels acquired by her during coverture, which, if the act had not passed, would have been subject to the debts of her husband. At common law, so far as the facts are disclosed in this record, this property would be liable for the husband's debts.

The statute controlling the subject anterior to the Constitution of 1868 was the statute of 1845, which is as follows:

"2. Hereafter when any female, a citizen of this State, shall marry, or when any female shall marry a citizen of this State, the female being seized or possessed of real or personal property, her title to the same shall continue separate, independent and beyond the control of her husband, notwithstanding her coverture, and shall not be taken in execution for his debts: *Provided, however,* That the property of the female shall remain in the care and management of her husband."

"3. Married women may hereafter become seized or possessed of real and personal property, during coverture, by bequest, demise, gift, purchase or distribution; subject, however, to the restrictions, limitations and provisions contained in the foregoing section."

"4. Any married woman having separate and independent title to property, under and by virtue of this act, shall not be entitled to sue her husband for the rent, hire, issues, proceeds or profits of said property, nor shall the husband charge for his management and care of the property of his wife."

"5. The husband and wife shall join in all sales, transfers and conveyances of the property of the wife, and the real estate of the wife shall only be conveyed by the joint deed of the husband and wife, duly attested, authenticated and admitted to record, according to the laws of Florida regulating conveyances of real property."

"6. The husband shall not be held or deemed liable to pay the debts of his wife contracted prior to any marriage hereafter to be solemnized in this State, but the property of the wife shall be subject to such debts."

"8. All the property, real and personal, which shall belong to the wife at the time of her marriage, or which she may acquire in any of the modes hereinbefore mentioned, shall be inventoried and recorded in the Circuit Court Clerk's office of the county in which such property is situated, within six months after such marriage, or after said property shall be acquired by her, at the peril of becoming liable for her husband's debts, as if this act had not been passed: *Provided,* That any omission to make said inventory and record shall in no case confer any rights upon her husband."

The Constitution of 1868, so far as it relates to this subject, is as follows: Article 4, Section 26, provides that: "All property, both real and personal, of the wife owned by her before marriage, or acquired afterward by gift, devise, descent or purchase, shall be her separate property and not liable for the debts of her husband."

The Constitution of 1868, Article XV., Section 2, provides "that all acts and resolutions of the General Assembly, * * * not inconsistent with the provisions of the Constitution and statutes of the United States, or with this Constitution, or with any ordinance or resolution adopted by this convention, and which have not been, and are not by this Constitution, annulled, are in force, and shall be considered and esteemed as the laws of the State until such acts or resolutions shall be repealed by the Legislature of the State or this convention."

This act, it will be admitted, is not embraced in the statute repealed or abrogated by the provisions of Article XV., Section 2, of the Constitution, except in so far as it

may be "*inconsistent*" with the provisions of the Constitution upon the subject, as it certainly is not inconsistent with the laws or Constitution of the United States, or with any ordinances or resolution of the Convention of 1868.

A moment's consideration will show that in this case our enquiries upon this subject are limited to two questions.

First. Whether the act of 1845, so far as it provides for a conditional liability of the wife's property acquired during coverture, to the husband's debts is not repealed. In other words, whether the exemption of the Constitution is not absolute and fixed, depends alone upon establishing the fact that the property is the separate property of the wife, not controlled or regulated by any past legislation upon the subject.

Second. Whether the wife, with or without her husband, could, under the act of 1845, have interposed a claim to try her title to personal property, acquired during overture, which had been levied upon under an execution against her husband, and if yea or nay, whether the Constitution has denied such power or given it, as the case may be.

To the first question:

This is not regulation of organic or constitutional provisions by subsequent legislation, and, therefore, it does not present to this court a case wherein we are to determine the constitutionality of a limitation or regulation by the Legislature of an exemption secured by an antecedent Constitution. Hence the delicate duty of determining whether the exercise of power by the Legislative Department of the government is in conflict with our common, superior and official creator, the Constitution, does not here devolve upon us. In this case the rule of construction is fixed by the Constitution itself. It provides that if the conditional liability fixed by the antecedent statute is not "*inconsistent*" with the absolute fixed exemption of the Constitution itself, then the statute may be operative.

While it cannot be denied that an organic or legislative exemption from sale under execution of personal property, (real property was exempt at common law,) is in derogation of the common law, yet it is true that in many of the States, perhaps in a majority of them, the rule applied to statutory or constitutional exemptions, even of personal property generally, is that they are to be construed liberally. Here the exemption is of the property of one person from liability for the debts of another. For, while the provision of the Constitution, so far as it empowers a *feme covert* to *acquire* personal property, is in derogation of the common law, and if to be construed liberally must be done so upon the principles of intent and public policy, yet the statute which subsequently subjects property thus acquired to the debt of the husband for the benefit of his creditor, and which, at the same time, provides that the "omission" which gives the creditor the right, "shall in no case confer any right upon the husband," is certainly, to the extent of the peculiar liability created, in derogation of the common law.

This statute is therefore of a character which is to receive a strict construction if it is to be held operative in this case. We do not think, however, that it can so operate. A conditional liability is "*inconsistent*" with an absolute and unrestricted exemption.

The statute imposes the first, the Constitution vests the latter; the statute ceases to be "in force," the Constitution alone becomes operative. It is certainly true, also, that a constitutional provision, regulating the same matter as a statute, must be construed with reference to existing law upon the subject, and in this view, if the statute is to be held to control and to be operative, then the constitutional provision was unnecessary, as without it the rule of the statute would have prevailed. A construction of this ex-

emption clause of the Constitution which would make it mere surplusage, (12 Fla., 205,) and which would engraft on it a limitation or modification, existing by virtue of an antecedent statute, we cannot conceive is proper.

The next question (which has been before stated as one of the questions involved in this case) is whether, under the act of 1845, the wife, with or without her husband, could interpose a claim and try her title to property levied upon under a *fi. fa.* against her husband, and if yea or nay, whether the Constitution has denied such power or given it. As to the separate estate of the wife, it has been held that the husband in possession is a trustee, and that he may interpose a claim where the property is levied upon under a *fi. fa.* against a person other than himself. (27 Ala., 169.) When his creditors make the levy upon such separate estate the rule may perhaps be different. But this matter is not here involved. What we are to deal with here is the wife's separate property. In this property, under the statute, the wife has the title both legal and equitable. This title, both legal and equitable, however, is subject, under the statute, to the marital rights of the husband so far as they exist under the statute creating the statutory separate property, or the common law, which is operative whenever the statute does not control. The marital rights of the husband here exist or are created to the extent that he has the right to its care and management, and is not subject to be sued by the wife for its hire or rent. This statute, while it protects and continues the title of the wife to real and personal property owned by her at the marriage, and enables her to become seized or possessed of it during coverture, does not give her the right to bring an action in her own name at law for its protection. She is not invested with the powers of a *feme sole* as to this property. We understand the rule to be that the wife is not clothed with the powers of a *feme sole* in

respect to her separate statutory property unless that power is given in express terms, or in terms from which such power is necessarily implied or follows in law, and then the power exists only to the extent of such implication. The statute here simply continues her title to property owned by her at the marriage or acquired afterwards, and protects it from her husband's debts. Neither in express terms nor by implication does this confer the power of a *feme sole*, or give her the right to sue in her own name, nor can she unite with her husband in a case of this character to file a claim to property. As to her separate statutory property, the interest of the husband here is adverse to the wife, not so, it may be, perhaps, in a social or domestic sense, but so in a legal sense, for her interest in the property is controlled, modified and limited by his marital rights. It is for this reason that whenever she asserts her equitable title to such property when assailed by her husband's creditors, which is this case, her husband should be a party defendant in order that he may protect his marital rights. Again, the wife not being a *feme sole*, cannot make a bond which would bind her personally at law or in equity. She cannot either go into a court of law through her next friend. Indeed, there is no such thing as a suit at law by a *feme covert* through a next friend, because she is the party to a suit by next friend, and it is for collateral reasons, outside of her right of action, that she acts through him. She is the party, he the instrument, for collateral purposes unnecessary to mention here.

In the case of Price *et ux.* vs. Sanchez, 8 Fla., 136, the husband and wife interpose a claim, and this court, upon appeal, decided the case, but the question was not there raised, and the case does not control us unless it was considered and decided.

Has the Constitution changed the statute in any other re-

spect than to repeal the antecedent conditional liability for the debts of the husband? To this extent, and to this extent only, we think the Constitution changes the statute, for we can discover no inconsistency in any other respect between the two. Indeed, if we recollect that in this State the distinction between separate property under the statute and separate estate in equity had been recognized in many cases, and that separate property was such as existed under the statute with its incidents, we cannot see how we are to create some new species of interest in the wife. The Constitution must be interpreted in view of the then existing law. It is not inconsistent with the general nature of a separate property in the wife that the husband should manage it, and for his management should have the control of the rents to support the family. Indeed, in most of the States where such separate statutory property exists, the husband is allowed some interest or power in the matter.

Again, a careful examination of the Constitution shows that it does not in terms give the right to the wife to retain or to acquire property, but the language is in the past tense and relates to a present power and existing right. It refers to property "*owned*" and "*acquired*," and while independent of the statute such a provision might be held to invest the wife with such rights, yet, in view of the existing statute conferring and regulating this right of acquiring property, we think, construing the Constitution with reference to existing rights, the separate property there intended is such as existed under the statute.

Our conclusion is that the Constitution repeals the statute only to the extent of removing the conditional liability, and it therefore follows from what has been said before that the wife not being a *feme sole* under the statute or Constitution, she cannot file a claim bond and resort to this

method to try her title to the property involved in this suit.

The wife being unable, either with or without her husband, to give this bond at law, it follows in this case that the injunction granted upon the amended bill was erroneous so far as it was based upon the view that she could give such bond, and as that was its only foundation the final order was erroneous.

The only remaining question is whether the bill does not itself authorize an injunction. We think it does. The allegation is substantially that she purchased this property with her own means, and that she always was, and still is, the owner thereof. This is an express averment that the title is in her, and that it is her property, and while the rule as to the proof of this allegation is very strict, and she should be required to establish it clearly, yet this general allegation in the pleading is sufficient. (1 McCarter, 429.) Upon this property thus alleged to be hers the sheriff levies an execution to satisfy a debt of the husband. There was equity in the bill, and a preliminary injunction or restraining order was proper. Such portion of the bill here as alleges matters concerning the levy is, for the purposes of this suit, immaterial. The equity set up is that it is the property of the wife, and it is immaterial whether the levy was a good one or not. It was at least an attempt to levy, and the court properly enjoined any further proceedings in that direction.

The motion to dissolve here is upon bill and affidavits before answer. The affidavits submitted by the defendants do not traverse the material allegation of the bill. While the burden of proof may be upon the wife upon the issues to be made in future, and she should be held to strict and full proof, yet we cannot, because certain irregularities of a character usually adopted to accomplish the fraudulent

purpose of screening property from debts to which it is subject are apparent upon the face of the bill, direct a dissolution of the injunction.

Before disposing of the case a few words in reference to parties is proper. The bill here should have been by the wife, through her next friend, against the husband and the creditor. "In all such cases," said Judge Story, "she ought to sue as sole plaintiff by her next friend, and the husband should be made a party defendant." (Story's Eq. Pldg., §63; 1 Daniels' Chy. Practice, 109; 1 McCarter, 423; 21 Ark., 272; 1 Beas., 97; 2 Keen, 60; 14 M'r'l'd, 258.) There has been in this case neither demurrer, answer nor plea, and the wife should be permitted to amend by making parties as stated. The want of such parties is no ground for the dissolution of the injunction or the dismissal of the bill. 2 Keen, 60; 1 McCarter, 424; 1 Daniels' Chy. Practice, 109, and cases cited.

Again, the sheriff here is not a proper or a necessary party. As to the views of this court upon this subject see 13 Fla., 116; see also 4 Ired., 474; 10 Ohio, 268.

The court should require proper security for the forthcoming of the property to abide final decree. If the defendants wish affirmative relief here a cross-bill will be necessary.

The order allowing an injunction until the further order of the court is affirmed, and the case will be remanded for further proceedings consistent with this opinion and conformable to law, the costs to be equally divided between the parties.

PHILENA E. SMITH, APPELLANT, VS. HIRAM R. SMITH, APPELLEE.

1. A married woman cannot in this State maintain a suit in her own name, but must sue by next friend, unless in cases where she has been licensed by the Circuit Court to transact business in her own name as provided in Chapter 3130, Laws of 1879.
2. Although it may be within the power of this court to remand the cause to the Chancellor, with directions to allow an amendment by substituting a next friend to prosecute the suit, yet, where upon looking at the pleadings and testimony, if no case is made out entitling the complainant to a decree, the decree of the court dismissing the bill will be affirmed.

Appeal from the Circuit Court for Alachua county.

The bill states that the said defendant purchased certain real estate near the town of Leesburg, in the county of Loudon, in the State of Virginia, for which he was to pay the sum of one thousand dollars; that defendant received from complainant's uncle's estate, her separate property, at one time two hundred dollars and at another, from oratrix's father's estate, one hundred and thirteen dollars, which said amounts were paid by said H. R. Smith as part purchase-money for said property; that afterwards, to-wit, in July, A. D. 1873, there being still due and unpaid on said property more than five hundred dollars in the form of a mortgage, one Frederick Tozer, of Waverly, New York, uncle to complainant, removed and paid up said incumbrance or mortgage, and on his decease willed the same, by his last will and testament, to your oratrix as her separate property and estate, yet, notwithstanding the fact that the purchase-money as aforesaid for said property was the separate estate of complainant, the said defendant took title to the same in his own name contrary to the wishes of oratrix, and the protest of oratrix's friends and relatives; that afterwards, in January, A. D. 1887, the said defendant

sold and conveyed the said mentioned real estate for the sum of eight hundred dollars, and removed to Florida, and with the proceeds arising from the sale of the said property purchased a certain tract or parcel of land situated in the town of Gainesville, describing it, for the sum of two hundred and fifty-five dollars, and again took the title in his own name contrary to the wishes and desires of your oratrix. But, on the contrary, when the subject was referred to would invariably assert that he would not have property in the name of your oratrix; that he would not have a wife who so wanted property in her own name and right. To all of which sayings and doings your oratrix quietly submitted in order to avoid family feuds and troubles; that the said defendant is now confined in the prison of the county upon a grave and heinous criminal charge, unnatural as well as criminal in its nature, and she cannot longer live with him, but is fully determined to separate from him forever.

There was a demurrer to the bill, but it was overruled by the Chancellor.

The defendant's answer admits that he did purchase some real estate near the town of Leesburg, Virginia, about the date alleged, at about the price of one thousand dollars, but denies that he ever at any time received any money either from the complainant's uncle's estate or from the complainant's father's estate as her separate estate or property, and he denies that any of the complainant's separate property, money or estate ever went into the purchase of or in payment for the real estate purchased by this defendant near Leesburg. He also denies that Frederick Tozer, the alleged uncle of the complainant, ever paid off or bequeathed by will to the complainant herein any mortgage that rested as a lien upon the property in Virginia purchased, and says that if the said Frederick Tozer ever held

or owned any mortgage upon said property the amount thereof was paid off and discharged by defendant in work and labor performed for the said Tozer at his request, and that if the said Tozer ever bequeathed by will to the complainant herein any such mortgage the same was a worthless and valueless bequest, the same having been fully discharged and paid by this defendant before any will of the said Tozer became operative in which the said mortgage could have been bequeathed to the complainant herein.

He admits that the title to said real estate in Virginia was in defendant's name, "as it rightly should and ought to have been," but denies that taking the title in his own name was contrary to the wishes at that time of the complainant or of her friends or relatives, but says that even if it was it cannot avail the complainant anything herein since said property in Virginia was purchased and paid for by this defendant with his own funds, work and labor.

He admits that he did at about the time mentioned in the bill sell and convey the real estate in Virginia, and that he removed to Florida, and that with a portion of the proceeds of the sale of his Virginia real estate, he, this defendant, did in part purchase and pay for the real estate situated in the town of Gainesville, Florida, at the price of two hundred and fifty-five dollars, and he admits that he took the title to the same in his own name, "as he should and ought to have done;" but denies any of the purchase-money which went into the payment for said real estate in Gainesville was ever owned by, or was ever the separate property of the complainant herein, or that the complainant herein was ever in any way entitled to any portion of the said purchase-money. He says that the taking of the title to the said Gainesville, Florida, real estate in this defendant's own name may have been contrary to the wishes of the complainant, he now doubts not but that it was

against her wishes, but says that this cannot avail the complainant anything herein, since said property was wholly purchased and paid for by this defendant with his own funds.

He admits that he is now confined in the prison of the county, and *charged* too with a crime the most grave, heinous and unnatural, but says that never having yet been either tried or convicted of said charge, this he consoles himself, not only with his own self-consciousness of his entire innocence of said charge, but also with the remembrance of that humane maxim of the law, "that a man is always presumed to be innocent until he is proven to be guilty," and says he deeply regrets that his wife, the complainant in this suit, should thus in her bill exhibit a willingness more swiftly to condemn this defendant upon said charge than the law itself.

He makes the usual denial of everything not otherwise answered, confessed, traversed and avoided or denied.

There was replication, and the cause was referred to a Master to take testimony.

The complainant testified that the defendant received from her uncle, Frederick Tozer, through his will, the sum of five hundred and thirty-one dollars and several years' interest; says she is the identical person named in the will, and the bequest was made to her personally; defendant received other moneys, affiant's personal property, one hundred and forty dollars on sale of melodeon, given to her by her uncle, Frederick Tozer, and $50 for sale of a cow, given affiant by F. Tozer, and one hundred and thirteen dollars arising from affiant's father's estate, John S. Tozer, and that each and all of these moneys were paid by defendant on the Virginia property. The property was sold by defendant, Smith, and she received none of the proceeds of such sale. It sold for eight hundred dollars. He used the pro-

ceeds of said sale in the removal from Virginia here, buying the property in Gainesville, Fla., and in improving the same; he used, for his own purposes and benefit, the balance of the proceeds of the sale of the Virginia property.

She "persistently contested against H. R. Smith taking the titles of both the property in Virginia and Florida in his own name," and only yielded to keep the peace. He had no money for the purchase of either parcels of property except what came from her father's and uncle's estates, and sales of her property. She states that it is her purpose to separate from him, and *has* separated from him.

Complainant put in evidence a transcript of the record from Loudon county, Virginia, of a deed from herself and defendant to Geo. K. Fox, Jr., dated June 24th, 1870, conveying land in said county to Fox as trustee to secure the payment of a bond for $531, of even date, executed by defendant, payable to Alfred Bennet five years after date, with power in Fox to sell, &c.; also a deed from between Fox of the first part and the executors of F. Tozer of the second part and defendant of the third part, whereby said trust is released, the said Tozer, to whom said bond had been assigned, having, by his last will and testament, bequeathed the same to complainant; also a transcript of the said will and testament from Kings county, New York, by the fourth item of which will such bequest was made and release directed.

Thrasher & Hampton for Appellant.

Taylor & Sanchez for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

This was a bill filed by appellant, who is a married woman, residing in Florida, against her husband, who is also a resident of this State. The bill is brought for the pur-

pose of obtaining a decree declaring certain real property heretofore conveyed to him declared to be and set apart to her as her separate estate and property, and authorizing her to sell, convey and dispose of the same as she may deem proper. The alleged ground of such prayer is that the property was purchased with money which was the proceeds of her separate property in Virginia. The Chancellor decreed upon the bill, answer and testimony that she had failed to make out her case and dismissed the bill; whereupon she appealed.

It is the well established law and the universal practice of the courts that a married woman cannot maintain a suit in her own name, but must sue by her next friend. 1 Dan. Chy. Pr., 5 Am. Ed., 108; Story's Eq. Pl., §§61, 63; 2 Vesey, Sr., 452; 5 Paige, 581; 8 Wend., 357; 3 Paige, 440.

The only exceptions to the rule were in cases where the husband had been banished, or had abjured the realm, or been transported for felony. Under an act of March 11, 1879, married women may be licensed and empowered by the Circuit Court to transact business in their own names, and to sue and be sued, as if they were unmarried. (McClellan's Dig., 756.) This is the only law of this State authorizing suits by married women alone.

No objection was taken by the appellee (defendant) to the manner of bringing this suit, but we cannot, by our silence, permit or endorse such a violation of well established law.

The Chancellor might have allowed an amendment, so as to have cured that difficulty, (3 Paige, 440,) and we may have the power to send the case back with instructions to allow the amendment, but, looking at the pleadings and testimony, we do not think such a case is made as would warrant a decree granting the prayer of the bill.

The decree is affirmed.

JULIUS A. HAYDEN, APPELLANT, VS. BARTON H. THRASHER ET AL., APPELLEES.

1. Where a surety becomes liable by signing at the request of a co-surety, who agrees to indemnify and save him harmless, he may, after the money becomes due, maintain a bill in equity to compel the co-surety to pay the debt and save him harmless, not only as to money he has paid, but also as to whatever he is liable to pay on account of being such surety.
2. In such case, where fraudulent conduct on the part of the co-surety who ought to pay the debt is shown, not only in the inception of the liability, but in the disposition of his property, a writ of injunction and such other process as may be necessary may be prayed in the first instance to prevent fraudulent transfers, and to hold property and assets to the relief of the surety entitled to protection, and it is not necessary to obtain judgment at law against the co-surety before filing such bill.
3. A bill in the nature of a creditor's bill is not multifarious because it prays discovery and relief against several who are not united in interest, and who may be strangers to each other, as the object of the bill is to reach sundry assets of principal defendants in their several possession.

Appeal from the Circuit Court for Alachua county.

The appellant filed his bill in chancery in the Circuit Court of Marion county against the appellees, Barton H. Thrasher personally and as trustee for his wife, L. A. Thrasher, and her children, William A. Dickinson, Early W. Thrasher personally and as trustee for his wife and children, and George W. Means as trustee for Mattie S. Means and her children, charging as follows:

That on June 1st, 1875, Barton H. Thrasher solicited appellant to indorse for accommodation six promissory notes made by W. L. Thrasher, payable to his own order, indorsed by him and by his brothers, B. H. and A. M. Thrasher, amounting in the aggregate to $14,500, and stated to appellant that said W. L. Thrasher and B. H. and A. M. Thrasher were perfectly solvent, and would in-

demnify him against loss by conveying to him unincumbered real estate worth $30,000, and that said notes would be promptly paid at maturity. On the next day appellant went to the office of B. H. Thrasher in Atlanta, Ga., where he met B. H., A. M. and W. L. Thrasher, and relying upon the assurance of B. H. Thrasher, who is an attorney-at-law, as to the solvency of the parties and the title to the property offered as indemnity, indorsed said notes and took a conveyance to certain real estate situated in Fulton and Morgan counties, in the State of Georgia, as security in the event of the non-payment of said notes; that immediately thereafter B. H. Thrasher took those notes and got some of them discounted on the faith of appellant's indorsement, and he, his father, Early W. Thrasher, and his brothers, W. L. and A. M. Thrasher, left Georgia and removed to Florida, and with the money thus raised, and the notes thus indorsed by appellant, B. H. Thrasher bought the lands described in the bill and paid for them with said money and said notes, and had titles thereto made to B. H. Thrasher as trustee for his wife and children, Early W. Thrasher as trustee for his wife and children, and W. A. Dickinson, which real estate is the subject of this suit.

That at the maturity of the notes the maker and prior indorsers, W. L., B. H. and A. M. Thrasher, failed to pay them, and suits were brought thereon against appellants, and judgments rendered against him for $6,510.78, which amount he was compelled to pay; and that suits were then pending against him upon the other notes, and would soon go to judgment.

That at the time that appellant indorsed said notes W. L., B. H. and A. M. Thrasher were insolvent, though that fact was not known to appellant, as B. H. Thrasher had assured them that they were all solvent; that at that time there existed in Morgan county, Ga., a judgment against

Early W. Thrasher (their father) for a large sum of money, and that he had given a stay bond under the laws of Georgia with his three sons, W. L., B. H. and A. M. Thrasher, as securities thereon, which judgment and stay bond were a lien upon the property conveyed to appellant as indemnity against his indorsement, but of the existence of which the appellant was ignorant, the fact having been concealed from him by B.H.Thrasher, though known to him (Thrasher) at the time.

That subsequently a *fi. fa.* issued upon said judgment and was levied upon said property so conveyed to appellant, and, though the appellant filed a claim thereto, and his claim was tried in the Superior and Supreme Courts of Georgia, the property was found subject to the judgment and was sold to satisfy the same, and became lost to appellant.

The bill charges that E. W. Thrasher and his sons, W. L., B. H. and A. M. Thrasher, conspired to obtain appellant's indorsement of the said notes for the purpose of defrauding him by obtaining money on the faith of his credit, and investing the same in the manner charged in the bill so as to defeat him in reaching the same; that they had no credit, and no means of raising money, and could not have made the purchases except for the money thus raised: that the appellee, W. A. Dickinson, afterwards combined with E. W. and B. H. Thrasher to defraud appellant by consenting to take title to some of the property in his name, and by taking a pretended and fraudulent assignment of a pretended and fraudulent mortgage from B. H. Thrasher, trustee, to E. W. Thrasher, and of a contract between George W. Means as trustee and B. H. Thrasher as trustee.

The bill also charges that said B. H. and E. W. Thrasher and W. A. Dickinson are about to still further convey and incumber said property to innocent parties for the purpose

of preventing appellant from following the same, and that they are insolvent.

No fraud is charged against G. W. Means, trustee, but he is made a party only because necessary to obtain the relief prayed.

The bill also charges that George W. Means agreed with B. H. Thrasher that if, at the expiration of three years, the said B. H. Thrasher so demanded, he, the said Means, would refund to the said Thrasher the sum of $5,000, part of said sum so paid by said Thrasher for the land described in said bill of complaint, with interest at 15 per cent. per annum, and take back part of the land, which agreement was in writing and contained a provision mortgaging other lands described in the bill as security for the faithful performance of said agreement.

That Thrasher, conspiring with said Dickinson to defraud appellant, assigned, for a pretended and fraudulent consideration, said contract to said W. A. Dickinson, and that said Dickinson is now seeking to collect said sum of money from Means.

The bill prays injunction to restrain Thrasher, Dickinson and others from selling or incumbering the securities and other property; that complainant be subrogated to Thrasher's rights under the contract and mortgage made by Means, and that the property bought with the money obtained by the use and discount of said notes be sold and the proceeds applied to the payment of the amount paid out by complainant, and for which he is liable, &c.

It also prays general relief. An injunction was allowed.

To the bill a demurrer was filed. The Chancellor sustained the demurrer upon one ground only, viz: "That said bill fails to show that complainant has recovered a common law judgment against defendant, B. H. Thrasher,

as the law requires, and against the other endorsers of the note exhibited," and the Chancellor dismissed the bill.

From that decree an appeal was taken.

[Mem.: Early W. Thrasher, one of the defendants and appellees in this cause, died after the appeal was taken, and, by proper proceedings, after due publication of notice as required by the twenty-fifth rule of this court, William M. Knox, as administrator of his estate, was made a party defendant and appellee herein.]

The ground of appeal is that the Chancellor erred in sustaining the demurrer and dismissing the bill.

S. D. McConnell for Appellant.

I. The demurrer admits all the allegations to be true, but denies the jurisdiction of the Court of Chancery.

The most of the defendants are sued as trustees, and fraud is charged. The property in controversy is in equity held in trust for appellant.

"Equity always has jurisdiction where fraud is charged, or where a trust is involved." Oelrick vs. Spain, 15 Wall., 228.

"II. Though there may be a remedy at law, if it be not as ample as in equity, or if it will require a multiplicity of suits to enforce it, equity always has jurisdiction." 1 Story Eq., 32.

III. The Chancellor seems to have been controlled by the opinion of the court in Barrow vs. Bailey, 5 Fla., 9, but an examination of that case will show that the ruling in that case is not applicable to this case, but that the cases are entirely different. In the case cited there was no fraud charged in the contraction of the debt, neither was it charged that the property sought to be reached was the fruit of the fraud. It was a simple debt claimed to be due, and the property

sought to be reached was the property *bona fide* owned by the defendant, but charged to have been fraudulently conveyed by him to defeat the debt. It appeared upon hearing the case that the judgment relied upon by the complainant was void, and the court properly held that as he had no judgment, he could not attack the title of a third party to the property in dispute, there being no allegation of fraud, except as to the last conveyance of the property.

In this case the bill charges fraud in procuring the money which was invested in the particular property, and charges that all the parties, to-wit: the four Thrashers and Dickinson were parties to the fraud, and that all were cognizant of it. It also charges that this property was bought and paid for with the money thus raised by this fraud, and that the titles were so taken as set forth in the bill, in order to perfect and consummate the fraud against appellant, and it prays that the fruits of this fraud be restored to the appellant, who was thus defrauded.

In Ritch vs. Eichelberger, et al., (13 Fla., 169,) no judgment had been obtained, neither had Ritch, who held a mortgage, established his debt by foreclosure of his mortgage. In addition to this his mortgage covered several pieces of property, only one of which had been sold, and it had not been shown by decree and sale that the other property was not sufficient to satisfy his demand; yet as in his bill he charged fraud in the sale, and as the defendants demurred upon the ground (among others) that he had not established his debt by judgment, the court held that inasmuch as fraud was charged in the sale of the property and the demurrer admitted the charge to be true, the bill should be sustained.

Now in that case there was no fraud charged in the creation of the debt, but there was fraud only charged in the sale of the property. Yet though the debt had not been

established, and though the remaining property had not been exhausted, the court held that the bill should be sustained and the demurrer overruled.

This bill charges fraud in the creation of the debt, fraud in the purchase of the property; fraud in the manner of taking the title; fraud in the pretended mortgage on the same, and in the pretended assignment thereof; fraud in the pretended assignment of the contract with Means and fraud in the purpose to sell and assign to innocent purchasers. In fact the bill charges fraud from the beginning to the end of the whole transaction, and the demurrer admits the same to be true.

IV. The bill charges that all the parties, viz: B. H., A. M., W. L. and E. W. Thrasher, are insolvent.

The liability of B. H. Thrasher as one of the prior indorsers of the notes is not denied, and the demurrer admits his insolvency. That fact, together with the other allegations in the bill, shows that the powers of a court of law are inadequate to give relief, and that a suit at law would have been fruitless and unnecessary.

Z. D. Harrison on same side.

The principle of contribution among co-sureties, originally one for equity jurisdiction. Story's Eq. Jur., §§492, 493, and cases cited.

Although courts of law have been given jurisdiction of such cases, equity jurisdiction is not ousted. Ib., 495, 496; 20 Cal., 130.

If Hayden, as a co-surety, has discharged a common liability he could not at law obtain a judgment against any one of his co-sureties for more than his proportionate part, although other co-sureties be insolvent. In equity he can apportion the loss among his solvent co-sureties, and if the

loss has been occasioned by fraud he can make the perpetrator of the fraud bear the whole burden.

It is a familiar principle that a surety who has paid off the debt is entitled to the benefit of any securities taken by other sureties for indemnification. (Story's Eq. Jur., §499; 2 Fla., 598; 9 Fla., 23.) How much greater the reason and stronger the right in a case like this for the interposition of equity.

Here a surety by collusion with the principal discounts the common obligation for cash, with which he buys property. Equity will extend its hand beyond the limits of the law, seize the property so bought and hold it for the benefit of the surety who paid the debt. Story's Eq. Jur., 1,265.

The right to a lien on this property, or conveyance of it for benefit of Hayden, could not be asserted at law, but in equity it can be sustained under the equitable principle of contribution or of implied trust.

The property sought to be condemned in this case is by demurrer admittedly held in trust for Hayden. Story's Eq. Jur., 1255, 1256, 1258, and cases cited.

Courts of equity, except as to wills, possess a general and perhaps a universal concurrent jurisdiction with courts of law in cases of fraud, cognizable in the latter, and exclusive jurisdiction in cases of fraud beyond the reach of the courts of law. Story's Eq. Jur., §184, and cases cited.

When debtor has fraudulently transferred property to a third party who is selling it in complicity, a receiver will be appointed, though no judgment has been obtained. 42 Ga., 46.

Injunctions will be granted to restrain vexatious alienation of property *pendente lite*. Story's Eq. Jur., §908.

In the United States very generally there are statutory provisions by which aid of a court of equity may be had in

favor of a judgment creditor (and sometimes even before judgment) to secure or apply assets which cannot be reached by ordinary legal process. The jurisdiction seems to exist also independently of statute. Story's Eq. Jur., §829. note 5; 49 Miss., 565; 11 Wall., (U. S.) 610; 100 Mass., 396.

The remedy at law must be as adequate and efficient as in equity. 5 Blatchf., 481; 31 Ga., 382; 37 Mo., 204; 17 Ill., 112; Story's Eq. Jur., §33; 6 Fla., 214.

In the case of West vs. Chasten, 12 Fla., 315, this court, after a full review of the leading cases on the equitable rights of sureties vs. principals, in a well considered and very able opinion, say on page 330: "It seems that when the day of payment arrives, without payment by principal, the equity arises."

This case is cited not only for the principle stated in the above extract, but also for other important principles therein ruled and applicable to the case at bar.

B. H. Thrasher, in *pro per. for* Appellees.

There is a debt due from B. H. Thrasher to complainant by reason of being prior indorser on notes. Can plaintiff subject real estate in equity before procuring judgment at law? 5 Fla., 9; 2 Fla., 92; 4 Fla., 349.

B. H. Thrasher cannot stand in light of trustee of Hayden's funds. He stands as if Hayden had loaned him the money upon his promise to pay. For this debt a court of equity will not grant him its powers before judgment at law. The fraud charged is not such an one as equity will take cognizance of before judgment at law.

What connection had E. W. Thrasher, trustee, with the house and lot sought to be subjected in the town of Gainesville? 1 Dan. Chan. Pl. & Pr., New Ed., 335; Old Ed., 386.

What connection had Dickinson or B. H. Thrasher with

the fifty acres of land sought to be subjected, and which belonged to E. W. Thrasher, trustee? The plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. 13 Fla., 189; Story's Eq. Pl., §530, 4th Ed.

Complainant seeks to subject separate and distinct pieces of property owned by different defendants when there is no community of interest between them when they cannot properly be joined in the same action. The object of the suit is double. 13 Fla., 189; Bouv. Law Dic., Multifariousness.

The defendant, E. W. Thrasher, as trustee, is brought as defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever.

Instance, house and lot in Gainesville. Dan. Chan. Pl. & Pr., New Ed., 335; Old Ed., 386, and note 2.

The defendant, W. A. Dickenson, is brought as defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever. Instance, the fifty acres of land alleged to have been bought by E. W. Thrasher, trustee, &c. Same authority as above.

If the court should conclude in this case that equity has jurisdiction, appellees insist that the court below had no right to issue the injunction prayed for in the bill, for the reason that no bond was given by complainant as the law prescribes, nor was any affidavit of inability to give bond filed. See McClellan's Digest, page 158, sec. 19, and 16 Fla., 773.

THE CHIEF-JUSTICE delivered the opinion of the court.

It is a well established rule that where one of several sureties pays a debt for which all the sureties are liable, the

party so paying may compel contribution from the other sureties *pro rata,* and this he may do at law or in equity. It is further established that in equity he may compel the *solvent* sureties to contribute *pro rata* according to the number of such solvent sureties. See Story's Eq. Jur., §§494, 497, and notes.

From the nature of the transaction by which the liability was created there may arise an exemption of one of the sureties from becoming liable to make contribution, as where one surety becomes so at the express solicitation of another who has paid the debt. Ib., §498.

Parker, C. J., in Taylor vs. Savage, 12 Mass., 102, says that it would be competent to a defendant even in an action of assumpsit, which is founded on principles of equity, when called upon to contribute, to show that the plaintiff, although apparently a surety, was in fact the real debtor, and that he would thus successfully resist the claim. "It is settled that when a surety joins in the bond *at the request of him who sues for contribution,* he shall not be held to pay." The Supreme Court of New Hampshire, in Cutter vs. Emery, 37 N. H., 567, 575, also say: "If two persons sign the same obligation as sureties for a third, one of them at the request of the principal and the other at the request of the first surety, they are not co-sureties as between themselves, but the first surety stands in the relation of principal to the second, is responsible to him for whatever he may be compelled to pay, and has, in no event, any claim against him for contribution." A formidable array of authorities is there cited showing this position, from Mass., N. Y., N. J., N. Car., Ky., Md., and from text-books.

When one of two sureties becomes such at the request of his co-surety, and upon his promise that he would be put to no loss, he may recover the whole of what he may have been compelled to pay of his co-surety, and such promise may be shown by parol. Apgar vs. Hiler, 4 Zabriskie, 812.

In the case at bar the bill shows that complainant became an indorser of the notes upon which the liability arises at the express request and solicitation of B. H. Thrasher, and upon his representation that the maker, W. L. Thrsaher, B. H. Thrasher and A. M. Thrasher (brothers), indorsers, were perfectly solvent and would indemnify him, and for that purpose gave him a mortgage upon property represented by B. H. Thrasher to be unincumbered. He thereupon became their security by indorsing with them the notes for the amount of $14,500. It turned out that the property so mortgaged was incumbered to a large amount, and was sold under executions against the Thrashers, and the security was therefore worthless.

With these notes, and upon the responsibility of Hayden, the money was obtained, and the Thrashers, who made and indorsed the notes, together with E. W. Thrasher, their father, came to Florida and invested it in the real estate and securities mentioned in the bill. The entire transaction on the part of the Thrashers is charged to have been fraudulent, and that there was a conspiracy between them to obtain his indorsement and raise the money on the notes, and invest it covertly to their advantage without paying the notes; and that they were and are insolvent.

The facts thus stated in the bill show, as strongly as language can be made to show, that as to the Thrasher brothers, and especially B. H. Thrasher, who is stated to have been their spokesman, they were the principals in relation to Hayden, and he their surety.

When the notes became due suits were commenced against him, and judgments recovered to the amount of over $6,500, which he was compelled to pay; and suits were pending against him for the recovery of the money due upon the residue of the notes.

He now seeks to compel payment by B. H. Thrasher,

whom he finds in Florida, of the amount he has already been compelled to pay, and also the other notes.

It is here objected that the bill will not lie because judgment at law has not been recovered against Thrasher. But however this may be in the case of an ordinary creditor's bill, it is not the rule in a case of this character. At law Hayden might recover what he has *paid* on account of those notes. In equity he may file his bill to compel his principal to discharge him from his liability. "Although the surety is not troubled or molested for the debt, yet, at any time after the money becomes payable, the court will decree the principal to discharge it." 2 Leading Cases in Equity, p. 1896, Fourth Ed., 1877, citing 1 Vern., 188; 3 Merivale, 579; Mosely, 318.

After the satisfactory examination of the question by this court in West vs. Chasten, 12 Fla., 315, 328 to 331, we cannot consider the matter open to discussion upon the facts stated in this bill. The complainant has a standing here which not only entitles him to re-imbursement for the money he has already paid for the Thrashers as their surety, but he has a right to be protected against the notes unpaid. For this purpose such a surety may, when necessary, have the aid of the equity powers and process of the court to reach any funds, securities or property available to that end, which, in law or in equity, should be so subjected, and in whosesoever hands the same may be found. From the statements in the bill the complainant is warranted in asking the aid of the court and the exercise of such power as may be appropriate to reach any such assets and make them available.

The first and fourth grounds of demurrer are that the bill is prolix and multifarious. We do not think it liable to such objection. Though it includes and charges several persons and transactions, its entire scope and purpose is,

like a creditor's bill, to reach certain property which, it is alleged, should be applied to relieve the complainant, and which, it is alleged, has been fraudulently placed beyond the reach of the ordinary process of the law. A bill is not multifarious where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights. 20 Pick., 368; 4 Allen, 341; 29 Mo., 350; 1 Ired., 389; and numerous cases cited in Dan. Ch. Pl. and Pr., 3 Am. Ed., 345.

The second and third grounds of demurrer are that there is no equity in the bill, and that the plaintiff has not recovered judgment at law against B. H. Thrasher and other indorsers of the notes. These grounds have been already disposed of by the consideration of the whole case made by the bill.

As to the security to be exacted upon the issuing or continuance of an injunction, except to stay proceedings at law, neither the statute nor the rules prescribe the amount or the conditions. These are left to the sound discretion of the court.

The conclusion is that the decree of the Chancellor dismissing the bill must be reversed and the injunction re-instated, and the cause is remanded with directions that such further proceedings be had as may be agreeable to equity and the practice of the court.

B. H. THRASHER, APPELLANT, VS. DOIG & GEIGER, APPELLEES.

1. A bill is not strictly a bill of discovery if it prays a discovery of facts when the discovery prayed and the allegations are not separate and distinct from the main object of the bill.
2. When a remedy in equity exists, and a remedy at law is created, the equity jurisdiction is not destroyed unless by express terms of the law.
3. Upon bill filed to charge property with debts contracted by an alleged owner for improvements thereon it is disclosed that the property is the separate estate of a married woman and her children, who are not parties to the suit, the bill should be amended by making them parties with proper allegations to establish the liability of their estate.
4. The estate of a married woman is not chargeable in equity merely by reason of a statutory lien for buildings and improvements, but because if she contracts such a debt it is implied that she means to pay it, and if she has a separate estate that is the fund out of which payment is contemplated.

Appeal from the Circuit Court for Alachua county.

The appellees filed their bill in equity against appellant, Wm. F. Carter and Wm. A. Dickenson, alleging that Thrasher, being in possession of a lot in Gainesville, contracted with Carter for the building for Thrasher of a dwelling-house upon the lot, Carter to furnish all the materials therefor. Carter applied to Doig & Geiger to get lumber to construct the building, and they, believing Carter to be irresponsible, declined to deliver the lumber until they had seen Thrasher on the matter, and Thrasher promised them that he would be responsible for the price of the lumber. On the faith of this promise they delivered a large lot of lumber, for the purpose of constructing the house, to the value of $253.38, which became due February 13, 1879. Geiger & Doig presented their bill to Thrasher, who referred them to Dickenson, who kept his

accounts, and, after some delay, it was discovered, as Thrasher and Dickenson pretend, that Carter had been over-paid, and Thrasher refused to pay the bill. Failing to obtain satisfaction Doig & Geiger filed notice of lien in the clerk's office. The records failing to show in whom the legal title of the lot was vested, it is alleged that the property was purchased by Thrasher, and that it was conveyed directly to Thrasher or Dickenson; and that Dickenson advanced the money to Thrasher to purchase the lot and erect buildings thereon. As to this it is prayed that Thrasher and Dickenson make discovery before the court as to who is the legal owner of the land, and that an order and decree be made subjecting the lot to the payment of appellees' claim, and to satisfy the lien thereof.

The answer of Thrasher and Dickenson denies that Trasher ever promised, or in any manner became liable, to pay for the lumber, and that nothing was said by Geiger & Doig about Thrasher's liability to pay for the lumber until after the lumber was delivered and most of it put into the building, and then, for the first time, Doig asked Thrasher if he could pay Carter's bill of about $250 for lumber they had delivered to Carter, the bill being made out against Carter; that Thrasher had made a contract with Carter whereby Carter agreed to build the house at a certain price. Thrasher says that the only reply he made to their application to pay the bill was that they would only get what was due to Carter after the completion of the house, Carter at that time being over-paid by some $300.

Thrasher further answers that Dickenson has no lien or security on the house for the advances made, and that the title to the lot is in him, Thrasher, as trustee for his wife and children, the land and the house having been paid for with their money and effects, and the property is entirely clear of all incumbrances.

After general replication filed testimony was taken and a decree entered adjudging that the complainants have and recover from Thrasher, *as trustee*, the sum of $253.38; that the same was a specific lien upon the lot and buildings and improvements thereon, and that the same be sold to satisfy that sum, with interest and costs. The bill was dismissed as to Carter and Dickenson.

From this decree Thrasher appealed.

Thrasher & Hampton for Appellant.

First. This is a cause wherein a bill in chancery was filed in Alachua county Circuit Court by Doig & Geiger, the complainants in said cause, against the defendants therein, to-wit: Wm. F. Carter, contractor, B. H. Thrasher, owner of the premises, and W. A. Dickenson, in which said bill the said complainants pray discovery of the ownership or title to the property in the said bill set forth. The complainants also seek by said bill to enforce a mechanic's lien against said property specifically. The defendants, Thrasher & Dickenson, in their answer to said bill, say that the title and ownership of said property is in the name of B. H. Thrasher, as trustee for his wife and children. The discovery prayed for in the bill having been obtained by the answer of the defendants all further proceedings thereon should have ceased. Story's Eq. Jur., Vol. 2, Sec. 1483; Story's Eq. Pleadings, Secs. 311, 312, 313 and 314.

Second. A bill for discovery is properly in aid of some suit or proceeding in another court. And where the object of discovery is to ascertain who is the proper party against whom the suit should be brought, it may be maintained before the commencement of such suit. But when discovery is had resort should then be had to the court having jurisdiction of the subject-matter.

Third. Where the remedy at common law is sufficient a court of equity will not entertain jurisdiction. In this case, after discovery was had, the common law statutory remedy was amply sufficient. The statute of 1868, as amended in 1877, created a specific common law statutory remedy. Acts of Fla. 1877, Ch. 3042, Secs. 23 and 24.

Again, where a statute creates a specific lien in favor of mechanics, &c., and also gives them a specific remedy for the enforcement thereof, a court of equity has no jurisdiction to enforce it, unless there be some impediment or difficulty charged to exist, which would render the remedy given by the statute unavailable. 3 Kelly (Ga.) R., 137; 5 Metcalf (Mass.) R., 525.

Fourth. Furthermore, there was no occasion for a bill for discovery in this case, since the plaintiffs had their common law remedy against the specific property under the lien law of this State, even though the name of the real owner thereof is not known. Their lien was filed without such knowledge, and why could they not enforce it also?—such being a proceeding *in rem*, and not *in personam*.

Fifth. Even if the court had jurisdiction of the subject matter it had *not* jurisdiction of the parties. The complainants' bill for discovery, after developing the fact sought thereby, to-wit: the real ownership of the said property, they did not afterwards make the said owner a party to the bill. The decree rendered in this case is against B. H. Thrasher, trustee, and yet there is no relief sought or prayed against the said Thrasher in his fiduciary capacity. Said decree is, therefore, unjust and illegal, and should be reversed and set aside.

Sixth. If the court of equity had complete jurisdiction of the cause, there is no legal liability attaching to B. H. Thrasher, as trustee for his wife and children, save for such an amount or sum as may have been due by said Thrasher.

owner, to the contractor, W. F. Carter, when the said lien of the complainants was filed in the office of the Clerk of the Circuit Court. Act of 1877, Ch. 3042, Sec. 2; 17 Fla., 162; 9 Pickering, 306.

The testimony in this case shows that at the time of the service of the written notice on the said Thrasher or on Dickenson, the said Thrasher did not owe the said W. F. Carter, contractor, *anything* at all. That on the contrary, Carter had drawn more than was due him by Thrasher.

Seventh. That W. F. Carter *was* the contractor is *not* denied. But Doig and his clerk, Voyle, say they indirectly understood from Thrasher, in conversation, that he would pay for the lumber. Thrasher swears positively that he *did not* promise to pay for lumber. There heing no *positive, direct* contradiction of Thrasher's statement, it stands intact. But even if such promise was made by Thrasher to Doig or Voyle it has no legal binding effect. "The promise to answer for the debt of another must be in writing." Thomp. Dig., 217.

Eighth. James Doig is the *only* witness who swears that Thrasher promised to pay for said bill of lumber before the lien was served upon him. This statement is positively denied by B. H. Thrasher in his answer. Two witnesses, or one witness, and corroborating circumstances, are required to rebut the answer of the defendant, responsive to the allegations in the bill of complainants.

Ninth. The defendants set up in their answer that when the service of the lien of the complainants was served on Thrasher and on Dickenson, that the defendant, Thrasher, did not owe the contractor, W. F. Carter, *anything.* There is no effort or proof on the part of the complainants to disprove this statement. Nor is there any charge or proof that Thrasher owed Carter *anything* at any time after such service; though the defendants *do* prove that there was *not anything* due Carter *afterwards.*

Tenth. The decree of the court below in this case is erroneous and illegal, because the said W. F. Carter is therein dismissed from the bill, and from the proceedings in this cause, and the entire debt is shouldered upon the defendant, B. H Thrasher, although all materials furnished by Doig & Geiger, and sued for in this case, were brought by W. F. Carter, and the bill for same was made out against him. And the complainants recognized Carter's liability by (according to the testimony of Carter himself) repeatedly presenting the bill to him and urging him to pay it, to which Carter would reply that he could do nothing until Thrasher returned home.

We therefore think the decree of the court below is clearly erroneous and illegal, and should be reversed and set aside.

R. F. Taylor for Appellees.

We take the position that Doig & Geiger's lien upon this building, which they seek to enforce by their bill in this cause, is not a "sub-contractor's" lien; and that their right to enforce that lien should not be put off and postponed, and made to be dependent upon the fact whether anything was then due upon the price agreed by Thrasher to be paid to the contractor, Carter, for the building.

Doig and Geiger are not in any sense of the word "sub-contractors;" they would not recognize Carter the contractor, but treated directly with the supposed owner of the building, and would not let their lumber go until they had that supposed owner's promise directly to pay for it, and that, too, without any reference to the amount that was to be paid to Carter; it was an independent contract for lumber that had nothing to do with Carter's contract at all. Can it be disputed that a man contemplating the building of a dwelling may contract directly with two or more con-

tractors and entirely independent of each other; with one of them for the building of one wing of his house; with another for the building of another wing; with a third for the doing of his masonry work; and with still a fourth one for the furnishing of certain classes of materials—lumber for instance. And may not all of these different contracts be entirely independent of each other? This is the case presented here. Thrasher contracted first with Carter for the building and for all materials; finding that Carter could not get lumber upon his own responsibility he makes an entirely new, distinct and independent contract with the complainants for their lumber. Doig and Geiger are to the fullest extent as much *original contractors* as Carter was, and the payment of their lumber-man's or material-man's lien should not be made to depend upon the fact as to whether anything was left of the amount going to Carter.

Again, the defendant, Thrasher, seeks to avoid the payment of this most equitable debt, incurred for the lumber which shields him from the storm, by setting up a contract with his contractor, Carter, and that Carter by that contract was responsible for all materials, and that he has fully paid Carter, &c. If a defendant would show matter in avoidance, after a *prima facie* case has been made out by the plaintiffs, the *onus probandi* is upon him to fully establish the avoiding circumstances. 10 Pickering, 378; 1 Met., 221; 17 Mass., 188.

Has the defendant, Thrasher, done this squarely and fairly? At the very threshold of this case he was pointed at by the finger of equity, and asked the question: Why do you not pay me for my lumber which protects you in comfort from the cold, the rain and the storm? His answer is, that I have paid your money over to some one else. And how does he support this declaration? Let the record be scrutinized from end to end, and it will be found

that he supports it by his own testimony standing solitary and alone; and that testimony does not even condescend to go into particularities; it simply says in one general sweeping sentence: "I have paid Carter all I owed him, and did not owe him anything when the notice of this lien was served on me." Under the circumstances did it not behoove him to show to these material-men an open hand and a complete record? Why, at the taking of testimony in the cause, did he not produce the books of the defendant, Dickenson, in which were kept all the payments to his contractor, Carter, so as to show from them by *dates* and *amounts* that on the day notice of this lien was served on him he had *fully paid* that contractor for building, materials and all? Instead of this, by an inspection of the record, it will be seen that nowhere does he even disturb himself to the extent of disclosing even the *amount* that he had agreed to pay and (as he claims) had paid to Carter, his contractor. Neither does Dickenson trouble himself to disclose any facts going to show the *amount* Carter was to receive, or had received. And Carter, too, keeps mum upon this point. The defendant, Thrasher, alone, in general terms, says: "I have paid him all I owed him," &c. If such was the fact, they had it in their power to show conclusively by items, *dates* and *amounts* that Carter had been paid in full on the *date* when notice of this lien was served on the defendant, Thrasher, and yet they have forborne to do so.

Another fact that appears inconsistent with the *bona fides* of this transaction. It is in proof that Doig and his clerk, Voyle, were persistent, diligent and energetic in their prompt demands, first upon Thrasher, who postponed him to Dickenson; then to Dickenson, who in turn postponed him to Thrasher; and thus he was "baffled" in the collection of his claim until wearied and disgusted he took that step which the law allowed him to protect himself from

what began to wear the aspect of trickery, and filed their lien upon the building. And yet, with all the energetic persistence and promptness of his demands, right at the laying of the cornet-stone of this building, and almost before the lumber of which it was built was laid upon the yard, he is confronted with the declaration that Carter, the contractor, has already been fully paid up for building, lumber and all; and that, too, in face of the fact that the contract with Carter stipulated that his payments were to come at intervals, dependent upon the different stages through which the building had to progress.

The appellant relies upon the decision of this honorable court in Trustees Wylly Academy vs. Sanford, *et als.*, 17 Fla. R., p. 162, to defeat the lien sought to be enforced here. We reply that this case does not apply to the one at bar, because Doig and Geiger were not "sub-contractors" under Carter. Their contract was directly with Thrasher, the owner of the building into which the lumber went, and was not dependent for its performance upon the contract with Carter. They were as much original contractors as Carter was, and had a right to establish a lien entirely independent of the contract with Carter.

Again, it is urged that the decree in this cause should be reversed because the defendant, B. H. Thrasher, discovered the title to the lot upon which the lien is claimed to be in him as trustee for his wife and children, and that they should have been made partes, &c.

Whose business was it to have them made parties? If their rights were to be invaded, it behooved them, and not the complainants, to see that they were represented in the cause.

But again, if the trustee had power to contract debts for the improvement of this trust property, which they, the *ces-*

tuis que trust, stood idly by and allowed him to do, certainly his contracts for those improvements should be binding upon that property. He being the trustee for the property, and holding the legal title thereto, and he being the one who made these contracts for its improvement, had it in his power more fully and effectually to defend that property from all suits growing out of his contracts with reference thereto than the *cestuis que trust* could possibly have done; and having thus defended, no damage has been done to the interests of the *cestuis que trust* by reason of their non-appearance as parties to the suit. If it were so necessary that they, the *cestuis que trust*, should have been made parties, why did not their trustee move to have them introduced as parties defendant? And with how much more force does this apply when it is remembered that he, the trustee, occupied towards those *cestuis que trust* the intimate relation of husband and parent?

The action being in its nature one *in rem*, and the decree being against him as trustee of the property, the legal title to which is in him as trustee, we submit that the decree is correct and proper.

Equity having assumed jurisdiction of the cause will retain it to the end, and will make such decree as conforms to the peculiar circumstances of each case, and until complete redress is afforded.

The justness and propriety of the decree in this cause being dependent upon *facts* proven at the hearing below, and the Chancellor, sitting at the hearing as both court and jury, with the right to pass upon the credibility of conflicting testimony before him, having rendered his decree upon that testimony, the Appellate Court should not, without great caution, disturb that decree, based as it is upon facts testified to by witnesses whose credibility is presumed to be known to the Chancellor. 7 Ohio St., p. 75; see case of

Solomon Towne vs. Nathaniel Grover, 9 Pick. R., p. 306, and authorities there cited.

THE CHIEF-JUSTICE delivered the opinion of the court.

The bill seeks to charge the specific property described with the price of lumber furnished by Doig & Geiger, and used in the construction of a dwelling-house for Thrasher. They allege that they refused to furnish the lumber to the contractor, but did furnish it at the instance of Thrasher and upon his express promise to pay for it, or to see that it was paid, and it is alleged that the lot on which the house was erected was in his possession, and that he had purchased it, but they do not know to whom the title was taken. Of this they pray a discovery.

Thrasher does not deny the correctness of the account of lumber furnished and put into the building, but says it was furnished to Carter, who had contracted to erect the house, and denies that he ever promised, before or after it was delivered, to pay for it except as a part of the contract price that might be due to Carter, and that Carter was over-paid when notice of lien was filed by Doig & Geiger. He discloses that the legal title was in himself "as trustee for his wife and children." He admits that he contracted with Carter for the erection of the house, and says he paid him for it.

The complainants, after the disclosure of the fact that Thrasher held the title as the trustee of his wife and children, without amending his bill so as to charge their interest, proceeded with the cause against Thrasher and obtained a decree against him "as trustee" for the amount due them, and that the decree was a specific lien upon the lot, and that it be sold to satisfy the lien.

The first objection to the bill is that it is a bill of discovery, and therefore it was improper to extend the decree

or to make a decree of the specific relief granted here. Every bill is in reality a bill of discovery, but the species of bill usually distinguished by that name is a bill for discovery of facts residing in the knowledge of the defendant, or of deeds or writings or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray the stay of proceedings at law till the discovery be made, and is commonly used in aid of the jurisdiction of some other court. Mitford Ch. Pl., 53; 2 Barb. Ch. Pr., 101; 2 Story's Eq. Jur., §1483.

The bill in this case is not strictly a bill of discovery. Its purpose is to charge property with an indebtedness, and the disclosure it seeks may be legitimate to the end sought, as matter of evidence of facts within the knowledge of the defendant tending to prove the allegations of the bill. "The discovery and the allegations upon which it is based are not separate and distinct from the main object of the bill, but have a very obvious relation to it." Butler vs. Durham 2 Kelly, Ga., 413, 420.

It is further insisted by appellant that because the statute has prescribed a method of enforcing such liens by an action at law the remedy in equity no longer exists, unless there be some impediment or difficulty in the way of the remedy at law. We cannot assent to the proposition that a remedy in equity once existing is taken away by the fact that a specific remedy at law has been created, unless the latter is expressly declared by the law to be the only remedy. 1 Story's Eq. Jur., §§33, 64*i*; 5 C. E. Green, N. J., 79; 20 Grat., 672; 1 Heisk., 30; 3 Lansing, N. Y., 127.

Liens as for purchase-money of land and for improvements thereon are peculiarly the subjects of equity jurisdiction. 1 Story's Eq. Jur., §506.

The complainants allege in their bill that the land was purchased by Thrasher, and was in his possession, but they

were ignorant of the *status* of the legal title, and they therefore demand a disclosure upon that subject. The answer of Thrasher is the only evidence in the record as to that matter. He discloses that he has the legal title "as trustee for his wife and children." The complainants should, at that point, have amended their bill by making the wife and children parties to the suit, because the husband as trustee, without some proper authority from the wife, or on account of the children, has no power to encumber their property or estate. A married woman may contract for the benefit of her separate estate and thus charge it in equity, and the intent so to charge it may be shown by parol, and it has sometimes been held that it may be presumed by circumstances. Wells vs. Thorman, 31 Conn., 318; Withers vs. Sparrow, 66 N. Car., 129; 39 Ind., 201; 103 Mass., 560; 38 Ind., 482; 31 Ind., 92, 106; 20 N. Y., 247; and see authorities cited in 2 Story's Eq. Jur., 11 Ed., §1400 and notes.

In the case of Administrator and Administratrix of Smith vs. Poythress, 2 Fla., 92, the bill was filed to make the settled, separate estate of Mary E. Cheeseborough liable for the payment of debts contracted by Wm. B. Cheeseborough, who was acting agent on said estate for his wife, for supply and improvement on said estate, and which contracts were for the comfort, accommodation and advantage of his wife, and made with her assent and sanction. The debts were contracted for lumber for the erection of a dwelling-house and other buildings on the estate, and for goods for her benefit. The husband had given his notes for these debts. It was held that the judgment creditors of Cheeseborough, the husband, (who had obtained judgments on the notes against the husband, and execution had been returned unsatisfied,) could maintain a bill filed to subject the separate estate of the wife, which was liable in

equity for the payment of these claims. The court holds also also that if the husband had paid such debt he could charge the separate estate of his wife for it. The principle of that case is sustained in N. A. Coal Co. vs. Dyett, 7 Paige, 9; Montgomery vs. Eveleigh, 1 McCord, Chy., 267; Cater vs. Eveleigh, 4 Dess. Eq. R., 19.

In cases of that character we considered the equity rule as settled in this State by the case of Administrators of Smith vs. Poythress.

Where improvements such as houses, &c., have been erected upon her separate estate or property by her own contract, or that of her authorized agent, equity will charge the estate with the payment of the debt contracted therefor, not because of the statutory lien in favor of mechanics or builders, but because the natural implication is that if a married woman so contracts a debt she intends to pay it, and if she means to pay it, and has a separate estate, that seems to be the natural fund contemplated by both parties as furnishing the means of payment.

The equitable estate of minor children is not liable for any indebtedness growing out of their own contract. They have no capacity to bind themselves except for actual necessaries suitable to their condition, or by hiring for wages, or by some act required by law. (Ib., §240.) They are the wards of a court of chancery. To what extent their estates may be affected by contracts of their guardian or trustee may be considered when their rights are directly involved.

What has been said in relation to the contracts of married women and the *status* of their property, and the *status* of infants, shows that in order to affect their estates by legal proceedings they should be made parties and brought before a court of equity by proper process, and that a court of law cannot give the relief prayed.

We refrain, of course, from examining the testimony taken and upon which the decree was founded. The equitable owners of the lot not being before the court, it was premature to charge the property and decree its sale.

The necessary conclusion is that the decree is reversed, and the cause is remanded with directions that the bill may be amended, if the complainants are so advised, within such time as may be fixed by the court, by adding parties and otherwise within the scope and purposes of the suit, and if not so amended the bill be dismissed.

P. M. OLIVER, APPELLANT, VS. P. G. SNOWDEN, APPELLEE.

1. A homestead of a person who is the head of a family residing in this State, within the meaning of the exemption clauses of the Constitution and the statutes, is the place of actual residence of the party and his family.
2. A party residing in an incorporated town or city with his family, and owning land several miles from the town, cannot claim the latter as exempt from forced sale as a homestead, it having never been occupied by him as a residence.
3. Filing a declaration or claim of homestead under the law of 1869 does not exempt the property so claimed, unless it be actually occupied as a home.

Appeal from the Circuit Court for Alachua county.

Peter G. Snowden, on the 26th of November, 1880, recovered a judgment at law in the Circuit Court of Alachua county against Peter M. Oliver, and had a *fi. fa.* issued therefrom. On December 2d, 1880, Oliver filed in the County Judge's office of Alachua county a schedule of his real estate that he desired and claimed to be exempted as his homestead, embracing therein the land levied upon un-

der the above execution, embracing 21 acres of land situated in the county.

Execution from the above judgment was levied by the sheriff upon these lands thus set apart by the defendant in execution (Oliver), and the land advertised for sale thereunder.

Appellant then filed his bill in equity against Snowden and the sheriff to restrain the sale of this property, alleging in said bill that he was the *"head of a family,"* and that he was *"a resident of the State of Florida,"* and that he had this property so levied on set apart as his homestead, &c.; An injunction was granted restraining the sale on February 5th, 1881.

The plaintiff in execution, P. G. Snowden, filed his answer to this bill; in which answer it is not denied that the complainant (Oliver) is *"the head of a family,"* nor that he with his family are *"residents of Florida;"* but the answer seeks to defeat and avoid the exemption of this property upon the grounds: 1st. That neither Oliver nor his family "reside upon" either of the parcels of land sought to be exempted, and that he has "no dwelling thereon;" and, 2nd, because the 21 acres sought to be exempted are composed of three (3) different parcels of land, one of which "is detached" from the other two parcels that adjoin each other.

That the whole amount of land sought to be exempted contains only twenty-one acres, lying all of it in the county, is also not denied by the answer.

After the filing of this answer the counsel for the respective parties entered into a written agreement to the effect that the cause should be submitted and heard by the court upon the bill and answer, and upon an agreed statement of facts as follows:

First. That Snowden obtained his judgment and execution as is stated in the answer to the bill, and that the execution was levied on the land as stated in the answer.

Second. That complainant in the bill, P. M. Oliver, nor his family, have ever resided upon either of the tracts levied on, but have resided in the town of Gainesville on a lot not yet paid for, but which, when paid for, is to become the separate estate of Mrs. Oliver, P. M. Oliver's wife. (There is nothing in the agreed statement of facts, or in any of the pleadings, that shows any otherwise than that Mrs. Oliver is paying or to pay for this lot in town *bona fide* with her own money.)

Third. That P. M. Oliver's occupation is that of merchant, real estate agent and auctioneer; and that he also "cultivates" all of the three parcels of land sought to be exempted by him, raising thereon vegetables, fruits and other products for market.

Fourth. There all three of said parcels of land are outside of and not contiguous to any incorporated town or city; and that one of the three tracts of land is detached from and about three miles off from the two first tracts that adjoin each other.

Fifth. That on the first mentioned tract there is a one-story house of two rooms that has been occupied by a tenant and field laborer of Oliver's.

Upon the above-agreed statement of facts, and upon the bill and answer, the parties went to a final hearing before the Circuit Judge on the 18th of July, 1881, when a final decree was rendered by the court dissolving the injunction and dismissing the bill, and adjudging that the land levied on could not be exempted or set apart as a homestead under the Constitution and laws of Florida, upon the ground, as is set forth in the decree of the court, that Oliver nor his family have ever resided upon or dwelt upon the lands sought to be exempted.

From this decree the complainant in said bill, P. M. Oliver, takes his appeal to this court.

Taylor & Sanchez, for Appellant.

It may be proper in the outset of the argument to call the attention of the court to the fact that no where in any of the papers or proceedings in this cause is it pretended that the judgment of Snowden sought to be enforced here was for purchase-money or for house, field or other labor or improvements put or performed upon the lands claimed to be exempted.

It is contended by the appellee that the appellant is not entitled to have these parcels of land exempted from forced sale as a homestead, because they are detached from each other and do not form a compact body.

That a homestead, when in a city or town, need not be in a compact body, but may be intersected by streets, highways, alleys, &c., see Gregg vs. Bostwick, 33 Cal., 227; Moore vs. Whittis, 30 Tex., 440; Hubbell vs. Cannady, 53 Ill., 427; Sterns vs. Hollingsworth, 74 Ill., 206.

And that country homesteads can be in separate tracts, situated apart from each other, see Maho vs. Cotton, 69 N. C., 289; Martin vs. Hughes, 67 N. C., 293; Williams vs. Hall, 33 Tex., 212; 62 Mo., 598. In the States of Wisconsin: (15 Wis., 635;) Illinois: (18 Ill., 194;) Vermont: (28 Vt., 672; 36 Vt., 269;) Iowa: (36 Iowa, 394;) and Minnesota: (15 Minn., 116,) it has been held that a homestead cannot be in disconnected tracts, but must be in one body.

But upon an inspection of the homestead laws of these States they will all be found to differ materially from our own. The decisions of their courts appear to be based upon that particular provision in their laws which, in express terms, requires a *residence upon* the exempted tract, and as a man can have a domicile or residence on only one tract lying immediately around his house, and not have his house scattered all over three or four disconnected tracts.

seems to be the reason for their holding that the tracts of land exempted must be in one body. In Wisconsin the law provides that the property exempted must be *occupied* by the owner. (Revised Statutes of Wis. of 1878, p. 783, Sec. 2983.) In Illinois the exemption is restricted and confined to the "lot of ground and buildings thereon *occupied* as a residence," and is further restricted to a value of $1,000. (Statutes of Ill. of 1858, Vol. 1, p. 576.) In Vermont the law expressly provides for the exemption only of the "*dwelling-house* and the land *connected* therewith." (Gen'l Stat. of Vt. of 1863, p. 456.) In Iowa the law provides that "the exemption *must* embrace the house used as a home," and provides for the taking of "one parcel only," unless its *value* is less than $500, when it may be extended to more than one tract. (Code of Iowa of 1873, p. 366, Secs. 1994, 5,6.) In Minnesota the law expressly restricts the exemption to the "dwelling-house tract," and further provides expressly that the creditor may insist on its being "in compact form." Statutes of Minnesota, Revision of 1866, p. 498, Secs. 1 and 4, and Revision of 1878, p. 767, Secs. 1 and 4.

So far as appellant's counsel have been able to discover, in all of those States where *residence upon the tract* has been held by their courts to be an essential element to entitle the party to an exemption, it will be found that the statutes or constitutions of those States expressly limit and confine the exemption to the *"tract resided upon."* And for the same reason it is held that only a single tract of compact form can be exempted.

Our Constitution has no conditions, limitations or restrictions attached to its exempting clause such as "the tract upon which he resides," or the "tract occupied as a home by the owner," or "the dwelling-house tract," or that it shall "embrace the house used as a home," &c.

The only conditions being, 1st, that he is the head of a family; 2d, and a resident of (not upon the tract but) *Florida.*

Thus entitling any and every poor resident of the *"State"* to this humane reservation of a sufficiency of land upon which, or from which, he can make a living, or from which he can get a start in the world. Neither does our Constitution place any such restrictions or conditions upon the right as "that the land exempted shall be contiguous and in one solid body." Neither has our Constitution any reference to or limitation as to the *"value"* of the tract exempted. Its language is unmistakably plain and mandatory, and its only mandate is as to the *amount of land,* not what it may be worth in dollars; and the only condition annexed to or governing the "amount of land" is as to its *location* geographically, whether in an incorporated town or in the country.

Causa arguendo, suppose, as is sometimes the case, a resident head of the family in this State should be too poor to build a dwelling upon his sole possession of 160 acres of land, which lay in equal portions on each side of a navigable river one mile wide, and that he with his family occupied by sufferance a house on his neighbor's land two miles away, but cultivate his own land, and with its products contributed to the support of his family, could it be reasonably maintained that in such a case this man's land could be forced to sale for his debts *non constat* our Constitution, simply because the land did not lay altogether in single compact body, or because he was so circumstanced as not to live or reside upon it at once? Hardly would the plain mandatory terms of our Constitution bear so harsh a construction when, as it has been so humanely and tersely remarked by this honorable court (in Patterson vs. Taylor & Randell, 15 Fla., 346,) "all the courts are constrained to

sustain the exemption laws upon grounds of public policy and humanity."

This court, according to our understanding of its meaning, in Loring vs. Wittich, 16 Fla., 509, seems to have construed our Constitution as only requiring that the party be "a resident of the *State*" and the "head of a family" in the following language: "When he asserts, therefore, that he came to this *State* over a year before, bringing with him his family, with the intention of making this (State) his permanent home, and that this *State* has, ever since he came into it, been his home, and with no intention of removing elsewhere; he alleges facts which show *prima facie* that he is *the head of a family residing in this State*, and unless it is shown that some of these material facts are not true, the case *required by the Constitution* to be made out by him is substantially shown." Any other construction of our Constitution would surely be imposing new and additional terms, conditions, restrictions and limitations upon the citizens' right to this humane provision incorporated into our Constitution when "gaunt famine, following close upon the heels of devastating war, smiled grimly o'er the land;" which right is there eliminated and declared in terms so simply clear that "he who runs might read and understand." And any other construction could only be arrived at by the subtleties, finely spun out, of a legally ingenious mind; when constitutional terms should be construed, in the language of Judge Story: "So that every word employed in the Constitution shall be expounded in its plain, obvious and common sense meaning. Constitutions are not designed for metaphysical or logical subtleties; for niceties of expression; for critical propriety; for elaborate shades of meaning; or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life,

adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them; the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss." Story on Const., §451.

And again: "The natural and obvious meaning should be taken without resorting to subtle and forced construction. Courts cannot correct *supposed* errors, omissions or defects. The office of interpretation is to bring a sense out of the words, and not to bring a sense into them. Though the spirit of a law may be referred to in order to interpret words admitting of two meanings, but never to extend a law to a case not within its written meanings." Rube vs. Grffin, 14 N. Y., 244; McCluskey vs. Cromwell, 11 N. Y., 593.

It is not and cannot be contended that our Legislature transcended their constitutional powers when they saw proper to enact the law which would seem to set the questions forever at rest that are raised in this proceeding. By this law it is expressly enacted that a man may, at his option, or not, as he pleases, exempt the tract "his residence is on." And the same law further provides "that if the first tract does not contain 160 acres it shall be the duty of the officer to set apart the remainder from any other *tract* or *tracts* claimed by the debtor." Laws of Florida, 1873, Chap. 1944.

With this statute staring us in the face, and no question raised as to its entire constitutionality, how can it be reasonably questioned that the head of a family, residing in this State, has the right to have set apart to him as his homestead exemption 160 acres of land in the country, and that, too, whether it lays in one compact form or scattered into half a dozen parcels, and notwithstanding the fact that

he does not actually reside upon or have his dwelling-house upon the same.

Thos. F. King for Appellee.

The position of the complainant is that it makes no difference whether he has a place of abode on the land or not, or on a tract contiguous to it; that under the act of Assembly of 1873, p. 22, he can claim as a homestead any tract of land he owns, whether he has lived on it or not. We take it that this is not the meaning of the act. That act by its title is "to amend an act providing for setting apart a *homestead* and personal property to be exempted from forced sale under process of law." The act which this act amends, to-wit: the act of June 23, 1869, pp. 26 to 29, provides for setting apart the *homestead* allowed by the Constitution. To say that a man may have a homestead and still not reside on the land he claims as such is a contradiction in terms. The purpose of the Constitution is to provide a place of refuge for a man's family which shall not be taken for debt. If the place is not used as a place of abode for the family of the owner it is not a homestead. The act of 1873 is simply for the purpose of declaring that when the homestead is not in a town or city, but is a rural one, the head of the family may have for a homestead lands divided into different tracts or parcels, in all cases, though, to be contiguous. This provision of the act is to disembarass the courts in construing the Constitution regarding homesteads from the many conflicting decisions upon the point whether tracts of land not contiguous shall be subject to homestead or not. The court will observe in "Thompson on Homesteads" that the authorities are very conflicting on this point, some saying that the tracts must adjoin, others that the homestead may consist of tracts not adjoining. The act of 1873 settles this conflict. The

homestead may consist of different tracts if they touch each other. But while the act settles this point it does not otherwise affect the terms or purpose of the Constitution, which are that a man's place of abode shall be secure to his family from his creditors or from his extravagances or vices. The act of 1873 declares that where the *homestead* is not in a town or city, &c., so that the question arises here what is the *homestead* of the complainant?

We say that to constitute a homestead *there must be a place of abode upon the land in which the family of the homestead claimant resides.*

For the meaning of "homestead" as adjudicated we refer to the following sections in "Thompson on Homesteads" and the authorities there cited: Sections 100 and note 2, 102, 105, 106, 107, 110, 111, 128, *n.* 4.

The complainant in this case never lived on the land in question. Ever since he has been in Florida he and his family have resided in the town of Gainesville, an incorporated town, within the limits of which the land in question is not situated. But, says the complainant, "that is nothing. I, in the words of the Constitution, reside in Florida, and, being a resident of the State, I can homestead 160 acres of land anywhere in the State I choose, and for any purpose. I can live in Pensacola and all that is necessary for me to exempt my land in Alachua county from my debts is to file a list of them with the Judge of Probate of that county. I may not only not have lived in that county, or on any part of my lands, but I may never have seen them. I may have on one part of my different tracts ten acres of orange trees worth $25,000, on another tract I may have a cotton plantation of 100 acres, on another I may have a store and sell $100,000 of goods in the year. This is all my 160 acres, and I have declared to the Judge of Probate that it is my homestead, and that makes

it my homestead." This is not what our Constitution, or any other constitution, or any statute, means by "homestead." See Section 40 and cases cited in Thompson on Homesteads, and also the opinion of Justice Bradley in Greely vs. Scott, 2 Woods' R., 657, decided in 1875, construing the constitutional provision of Florida respecting homesteads. In the latter case it will be observed, the Judge holds that to exempt land from the creditor the person claiming homestead must live on it, and he must, if a farmer, use the whole of it for his farm purposes. If any part is used by a farmer for a mill, or any other purpose than that of farming, it is subject to levy and sale. The land must be wholly used and required for the occupation of the owner, and if any part is appropriated to any other use than his usual occupation, it is not homestead. A contrary view to this would not be to further the beneficent purpose of the Constitution, that is, to furnish a refuge to the wife and children, but would protect and encourage dishonesty by allowing the debtor to contract debts by holding out to the world that he owns lands and pursues occupations which make him responsible, and which have no connection with his home or his usual occupation in life.

The acts of 1873 and 1869 were made by their very terms to provide for the manner in which the "homestead" of the Constitution should be set apart for the use of the family. They both mention "homestead," and point out the means for effecting the object of the Constitution. They devise how a "homestead" may be provided for a family, and do not declare that 160 acres, or any smaller tract, wherever situated and for whatever purposes used, may not be taken for debt.

If the land in controversy can be exempted it must be as a rural homestead, and because of its use by the com-

plainant as a farm. But the complainant is not a farmer. He has not only not lived on the land, but his occupations are to auctioneer and buy and sell land. He hires men to raise and ship vegetables and other produce raised on this land, thus employing capital in a business other than his usual occupation. The case of Greely vs. Scott, as well as all others, we think, show that the land must be employed for the usual occupation of him claiming the homestead exemption, and not as an incidental business in which he invests his surplus capital.

THE CHIEF-JUSTICE delivered the opinion of the court.

The material question is whether a debtor and his family residing in a town may claim a homestead in lands out of town which are cultivated but not actually occupied by them.

The word "homestead," as used in the Constitution and statutes of California, is thus defined by the courts of that State: "It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including out buildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country it may include a garden or farm. If situated in a city or town it may include one or more lots, or one or more blocks. In either case it is unlimited by extent merely. It need not be in a compact body; on the contrary, it may be intersected by highways, streets or alleys. * * The only tests are use and value. * * Whatever is used being either necessary or convenient as a place of residence for the family, as contradistinguished from a place of business, constitutes the homestead, subject to the statutory limit as to value." Gregg vs. Bostwick, 33 Cal., 220, 227.

This extract shows the difference between the statutory

regulations as to the extent of the homestead in that State and in Florida. In this State the extent of the homestead is measured by quantity and not value. Our Constitution exempts from forced sale "a homestead to the extent of one hundred and sixty acres of land *or* the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State," &c.

Appellant has his domicile with his family in the town of Gainesville upan a lot, the title to which is to be made in the name of his wife "when paid for;" and neither he nor his family have resided upon the lands lying several miles outside the town, which latter has been levied upon by the sheriff.

In Baker vs. The State, 17 Fla., 406, this court said that one who has owned and occupied with his family the limited amount of land and improvements mentioned has "enjoyed" it as exempt from forced sale, * * because the enjoyment of a homestead consists in the use and occupation of it with his family, according to the clear intent and purpose of the provision.

Thompson on Homestead Exemptions gives the following: The homestead means the *home place,* the place where the home is, and such is its legal acceptation at the present day. It is the home—the house and the adjoining land where the head of the family dwells—the home farm." (36 N. H., 136.) "It is the land where is situated the dwelling of the owner and his family." (16 Wis., 638.) "A homestead necessarily includes the idea of a residence." (24 Texas, 224.) It must be the owner's place of residence, the place where he lives. (23 Texas, 502; 10 Minn., 156; 5 Minn., 333; 7 Minn., 518; 42 Texas, 443.) It must appear that the lands were actually used, or manifestly intended to be used, as a part of the home of the family. 21 Wall., 486, Waite, C. J.

Our Constitution, speaking of a *homestead* and failing to define the word, leaves its definition to the ordinary rule of construction, which is that it is to be taken and applied according to the common and popular apprehension of its meaning, which is clearly given in the foregoing citations. It is scarcely possible that it can be misunderstood.

By our Constitution it may extend to one half acre and its "improvements" and appurtenances in a town or city, including the dwelling-house and place of business. (Whether this may consist of two or more separated or non-contiguous parts is not in question here.) Or it may extend to 160 acres of land and improvements not in a town or city. It cannot be more than either of these quantities. If the homestead, the place of residence of the debtor and his family, is in the town or city, the claim of exemption of rural lands cannot be allowed. It is only the "place of the home" of the debtor and family that can be exempt from sale for debts.

In this case the homestead is not upon the lands levied upon, or any part of them. Nor does the selection and the recording of the designation of a "homestead" under the law of 1869 make it a homestead in fact, so as to exempt the property from sale, without actual occupancy as a residence, or, perhaps, where it is "manifestly intended" to be used as the home of the family, as was said by the Chief-Justice in 21 Wall., 486, the manifest intention being shown by proof of preparations made to occupy it immediately as a home.

The case of Loring vs. Wittich, referred to by appellant's counsel, treated only of the exemption of personal property, and had no reference to the homestead.

Whether two separate portions of land, outside of a city or town, may be traeted as a homestead, the residence being upon one of them and the other used as a part of the

same farm, is not here involed. But the home of the debtor and his family being in the town, the exemption of real property out of town cannot be sustained under the Constitution of this State.

The decree is affirmed.

R. L. CATHCART, APPELLANT, vs. J. W. TURNER, ET AL., SHERIFF, APPELLEES.

1. As between landlord and tenant the tenant cannot claim an exemption from levy and sale of the products of the land rented as against the claim for rent or for supplies furnished by the landlord to support the tenant and his family or to cultivate the land, the title of the tenant thereto being subordinate to the lien created by the statute.
2. An exemption of personal property from forced sale under legal process, to the extent of $1,000 in value, may be claimed under the Constitution, by a tenant entitled to claim exemption when his property is levied upon for the satisfaction of a claim for rent or supplies furnished by the landlord; but such exemption cannot be claimed out of the products of the land rented where an express lien exists under the statute.
3. A suit in equity cannot be maintained under the law of 1881 against a sheriff to enjoin him from taking proceedings to appraise and set apart personal property levied upon which is wrongfully claimed by a debtor to be exempt from forced sale, unless the sheriff actually does or threatens to do some act upon such wrongful claim tending to the injury of the creditor.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion.

Thrasher & *Hampton* for Appellant.

J. H. Goss for Appellees

THE CHIEF-JUSTICE delivered the opinion of the court.

Appellant filed his bill against appellees in Alachua county, alleging that Miley is indebted to him in the sum of seven hundred dollars now due (September 20, 1881,) and unpaid for rent of land of Cathcart for the year 1881, and for supplies furnished to Miley by complainant; that complainant finding that Miley was fraudulently disposing of crops on the premises obtained a distress warrant to distrain the property of defendant for such rent and supplies; that before the officer reached the premises with the distress warrant defendant ran off a large quantity of his stock of cattle, &c., beyond the reach of the law, and fraudulently disposed of or secreted the same; that the officer found no property except the growing crop of cotton and some household goods which he seized and took possession of for the satisfaction of said debt; that the defendant, Miley, has applied to Turner, the sheriff, "for the setting apart of said property as exempt from forced sale under the Constitution and laws;" that the defendant, Miley, refuses to pay, but is seeking to avoid payment by such fraudulent removal of his property and secreting the same; that Miley is not entitled to the exemption of his crops grown on the place; that under the contract for rent between the parties all the crops grown on the place were to be appropriated to the payment of the rent and for supplies furnished by the complainant, and none of it was to be sold by him until the said rents and supplies were paid for. Said contract is annexed as an exhibit.

The prayer of the bill is that the sheriff be enjoined "from setting apart the said property distrained by him under a distress warrant against the defendant, W. F. Miley, and in favor of this complainant as exempt from forced sale," or doing any act to delay his proceedings at

law against the defendant, Miley. A preliminary injunction was granted on filing the bill.

The answer of Miley denies the alleged indebtedness and sets up a contract made in January, 1881, by which he agreed to buy of complainant, and the complainant agreed to sell him the lands for $1,200, of which $500 was to be paid January 1, 1882, and $700 January 1, 1883, for which Miley gove camplainant his notes dated January 3, 1881, and at the same time complainant gave Miley a bond for title to the land, which contract has not been revoked; and defendant further agreed to pay complainant $200 for supplies furnished him during the year, and which is payable January 1, 1882. He further says that the agreement to secure the rent set out by complainant was not in fact made for any such purpose; that he was requested by an agent of complainant to sign it, and the contract was not read to him but it was explained to him by the agent to be a security to complainant for $500 of the purchase-money and $200 supplies to be due January 1, 1882. He denies the fraudulent disposition of his property as alleged. He admits that he has claimed the benefits of the exemption laws, and insists that he is entitled so to do.

The sheriff did not answer. On filing the answer of Miley the Chancellor dissolved the injunction, and from this order the complainant appeals.

The foregoing is a brief abstract of the bill and answer. Our only excuse for stating so much of these pleadings is that we desire to call attention to the fact that a great portion of both bill and answer relates to matters utterly irrelevant to the object of the suit.

The only facts important to the complainant's case are that complainant had obtained a distress warrant and caused it to be levied upon the personal property of Miley liable to levy to satisfy a claim for rent, &c., due, and that

Miley was illegally or improperly claiming exemption of such property from levy and sale, and that the sheriff was proceeding illegally or improperly to release and set aside the property or some of it as so exempt.

The only facts necessary to be stated by defendants are such as to put in issue the pertinent allegations of the complaint. Whether he owes the rent, &c., for which the distress warrant was issued, whether it is yet due, whether he had fraudulently put his property out of the way, whether he was in fact a tenant or a purchaser, whether he had been fraudulently cajoled or induced into signing a paper that he had not intended to sign, &c., are not responsive to the case properly made by the bill, and are therefore liable to exception, as were the irrelevant parts of the bill the proper subjects of demurrer.

The only pertinent matters set up by this answer are that he has claimed the benefit of the exemption of property levied, and that he is entitled by law to have such claim allowed. All the other matters set out in the answer may be contested before the court from which the warrant of distraint was issued, or by bill to set aside the paper signed by the defendant, Miley, mortgaging the crops to pay rent as having been procured by fraud or other undue means.

A warrant may issue to distrain property for the payment of rent due, or for supplies furnished to a tenant for his support and to aid him in cultivating the rented land, when the same becomes due, and the warrant may be levied upon any property liable to levy and sale. And claims for rent and for such supplies are an express lien upon the products of the land. As to such products there can be no claim of exemption, because the very title of the tenant to such products is subordinate to the lien. See Ch. 3131, Laws of 1879; Ch. 3247, Laws of 1881, McClellan's Dig., 701, 703.

In the bill it is said the sheriff had seized under the warrant the crop of cotton growing on the place and some "household goods." As to these household goods of the defendant, Miley, if he is entitled to claim the benefit of any exemption of property "from forced sale on *any* process of law," he can lawfully claim them as exempt from distraint for rent or any other process of law under the terms of Section 1, Art. 9 of the Constitution, to the value, if not more, than one thousand dollars. That being the case, the sheriff should not be enjoined from making an inventory, causing an appraisal to be made, and allowing the debtor entitled to an exemption to select and to set apart any such personal property, within the constitutional limit as to value, upon which the lien does not exist. Secs. 7 and 8, Ch. 1715, Laws of 1869, McClellan's Dig., 533, §§17, 18.

Now, as to this proceeding in equity to restrain the sheriff, until the act of March 7, 1881, Ch. 3246, it could not be maintained. According to the third section of that act the Circuit Courts now have equity jurisdiction "to enjoin and restrain a sheriff or other officer from setting aside real or personal property as exempt from forced sale where the same is not exempt, and may adjudge and decree the vacation thereof, and annul all exemptions made and set aside by any sheriff or other officer when the same has been illegally and improperly made by any sheriff," &c.

In order to warrant the filing of a bill against a sheriff, and subject him to the expense and annoyance of a suit in chancery and a decree for the costs of suit, it must appear that he has done, or is about to do, something to the injury of the complainant, and that is improper or illegal. The only allegation of the bill in respect to the claim of exemption is that Miley "has applied to the sheriff for the setting apart of said property as exempt from forced sale

under the Constitution and the laws." The sheriff is charged with *nothing* of which appellant could complain. He is not charged even with an intention to take notice of defendant (Miley's) application.

Until some action is had by the sheriff tending toward illegality, impropriety or injury to the complainant, he is not to be annoyed with such a suit.

Our conclusion is that the bill does not show that Miley is not entitled to claim as exempt from sale the household goods levied on, and it does not show that the sheriff is doing, or threatening to do, anything of which appellant can complain.

The decree of the Chancellor dissolving the injunction is affirmed, and the bill must be dismissed.

T. C. LANIER ET AL., APPELLANTS, VS. E. J. M. PADGETT ET AL., THE COUNTY COMMISSIONERS OF SUMTER COUNTY, APPELLEES.

1. The County Commissioners have no authority to order an election for the location of a county site under Chapter 1890, Laws of 1872, (McClellan's Digest, 321,) unless a petition is presented to them, signed by one-third of the registered voters of the county, praying for a change of the location of the county site, as required by the first section of the act.
2. Petitions merely asking that an election be held to locate the county site, or to locate the court-house and county offices, and not asking for a change of location of the county site, do not show that they desire a change; and an election ordered upon such petitions is of no effect to locate or change the county site.
3. Tax-payers may maintain a suit to enjoin the removal of the county offices and county records to any place not legally designated as the county site.

Appeal from the Circuit Court for Sumter county.

The facts of the case are stated in the opinion.

J. H. Goss for Appellants.

Hocker & Mabry for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

Lanier and others, complainants, are residents and tax-payers in Sumter county, and allege that the county site of that county is, and for a number of years has been, located at Leesburg, where all the county records have been kept, and that complainants and others have invested largely in property at Leesburg by reason of the location of the county site at that place, and that the removal of the county site to another place would have the effect to lessen the value of their property and injure their educational, social and religious interests. They further charge that the County Commissioners, (assuming to act under the authority of an act of the Legislature, approved February 27, 1872,) on the 6th day of June, 1881, ordered that an election for the purpose of locating the county site of that county be held; and that on the tenth day of October last an election was held to locate such county site, at which election a majority of the votes cast were in favor of the town of Sumterville; and the defendants intend, on the 15th October, to declare and order that the county site has been, in pursuance of said election, duly changed from Leesburg to Sumterville, and to order the removal of the county records and offices to Sumterville. The said election is alleged to have been illegally held, and is of no legal effect, because the petitions addressed to the board asking an election to be held did not express a desire for a change, nor ask that an election be held to "change the location of the county site," but only prayed that an election be called "to locate the

county site," or "for the purpose of legally locating the court-house," (citing the language of the petitions.)

The bill prays that the defendants be enjoined "from passing or adopting any order declaring the county site changed from Leesburg to Sumterville, or locating the county site at Sumterville, or any order of like purport and effect," until the further order, &c., and for such other relief as may seem proper.

The Chancellor refused the injunction, and complainants appealed.

The title of the act of 1872, under which the alleged election took place, is: "An act allowing the voters of the several counties in this State to locate their respective county sites."

The first section provides that the registered voters of any county wishing to change the location of their county site shall present a petition to the Board of County Commissioners of such county signed by one-third of the registered voters "praying for a change of the location of such county site." By section two the County Commissioners of any county receiving such petition as above specified shall order an election at the several precincts for the location of such county site, giving at least thirty days' notice thereof. Section three provides that the election shall be conducted in the usual manner prescribed by law for holding elections, and the returns of election shall be made to the County Commissioners or to the Clerk. Section four requires the County Commissioners to publicly canvass the returns on the fifth day after the election, and says that "the place receiving a majority of the number of registered voters shall be the county site of said county for ten years," and it is the duty of the County Commissioners to erect county buildings and provide offices for the county officers at the place so selected.

It is plain that in such cases the Board of County Commissioners cannot lawfully call an election for a location of the county site unless a petition is presented to them signed by one-third of the registered voters of the county. And from whom must the petition come? It is equally clear that it must come from registered voters who desire a "change of the location."

Unless such petition is presented the board cannot act, for that is the precise condition prescribed by the law. A petition asking the board to call an election "for the purpose of legally locating the court-house," or "desiring that the question of a county seat be settled so that suitable buildings may be erected for the business of the county," and asking that an election be called for the purpose of locating the county site (as these petitions are variously expressed) do not purport to emanate from or to be signed by voters desiring a "change" of location. For aught that appears in the petitions, none of the signers may have been in favor of a "change," as they merely ask that the question of a county seat may be settled and suitable buildings erected, or the court-house legally located, and that an election be called for these purposes, and every person signing may have been opposed to any change, but merely desired to have a vote which might "settle" the agitation of the question.

It is true that in many instances it may be necessary to consult the title of an act to explain its meaning, but this is not necessary in this case because the first section is clear and explicit, and if we should resort to the title of the act in this case it would give us no warrant to change the positive requirements of the act itself. Indeed the whole scope and purpose of the act is to enable the people to change their county site. The act, therefore, requires that there shall be a petition or petitions signed by those who shall ex-

press a desire for that change in order to give the Commissioners power to order an election.

The bill alleges that there never was any such petition presented, but that the petitions presented were such as are represented. There is no answer to the bill, and we therefore treat the allegations in it as true.

The result is that the election held under the order of the County Commissioners as alleged was not authorized by law, and the result of the election could not effect a change of the location of the county site.

Under the general prayer of the bill that the members of the Board of County Commissioners be enjoined from making any order or doing any act in the direction of effecting a change of the location of the county seat and the removal of the county offices and records by reason of the result of the election, an injunction should have been granted.

The injunction prayed was not to restrain the members of the board as canvassers of the result of an election, but to restrain them from acting upon the result of an unauthorized election. They would, therefore, be not enjoined from doing what the laws required them to do, but from doing an unlawful act.

Appellee says that the act of 1868 locating the county site at Leesburg is unconstitutional and void. This question can hardly be raised. The question is whether the County Commissioners should act in pursuance of an unauthorized election, and whether Leesburg is the lawful county site is not in issue.

The complainants, simply as tax-payers, in their own behalf and in behalf of other tax-payers, have a standing which entitles them to a remedy against a threatened wrongful proceeding which might involve them and the whole people of the county in great expense and confusion, and jeopardize the titles to property. Adam's Equity, 212; 19 Barb.,

166; 2 Caines, 179; 34 Ind., 119; 5 C. E. Green N. J. Eq., 82; 63 N. C., 147.

The decree refusing an injunction is reversed and the cause remanded, with directions to allow the injunction, and for such further proceedings as may be agreeable to equity and the practice of the court.

W. J. WARD ET AL., APPELLANTS, VS. GEORGE W. SPIVEY, APPELLEE.

S. with his family residing on public lands for eight years and having made valuable improvements applied to W. for a loan of $40 to enable him to enter the land. W. loans him the money, but S. not finding the land agent passes the money back to W. and requests him to make the purchase for S., and to hold the deed till the money was paid. W. enters the land in his own name and informs S. that "it is all right." S. continues to reside and make improvements on the land for five years longer until it is worth $2,500, when W. conveys the legal title to D. & M. for $700. The latter knowing of the long possession of S., and of his valuable improvements, and being further informed that S. claimed to own the property subject to the payment of the money due to W., *Held:*

1. That by the transaction between S. and W. the latter became the creditor of S., and held the land as trustee of a resulting trust in favor of S., and as security for the money advanced and interest.
2. That D. & M. having purchased with full knowledge of the settlement, occupancy and improvements by S., and that he claimed the property subject to the payment of the money advanced by W., are chargeable with notice of the trust, and their purchase gave them the same standing as that of W. in respect of the trust.
3. On bill filed against W., D. & M. by S. to redeem, he is entitled to a decree that D. & M. convey to him on payment of the $40 and lawful interest.

Appeal from the Circuit Court for Sumter county.

Spivey filed his bill against Ward, Dozier and Morrisette,

press a desire for that change in order to give the Commissioners power to order an election.

The bill alleges that there never was any such petition presented, but that the petitions presented were such as are represented. There is no answer to the bill, and we therefore treat the allegations in it as true.

The result is that the election held under the order of the County Commissioners as alleged was not authorized by law, and the result of the election could not effect a change of the location of the county site.

Under the general prayer of the bill that the members of the Board of County Commissioners be enjoined from making any order or doing any act in the direction of effecting a change of the location of the county seat and the removal of the county offices and records by reason of the result of the election, an injunction should have been granted.

The injunction prayed was not to restrain the members of the board as canvassers of the result of an election, but to restrain them from acting upon the result of an unauthorized election. They would, therefore, be not enjoined from doing what the laws required them to do, but from doing an unlawful act.

Appellee says that the act of 1868 locating the county site at Leesburg is unconstitutional and void. This question can hardly be raised. The question is whether the County Commissioners should act in pursuance of an unauthorized election, and whether Leesburg is the lawful county site is not in issue.

The complainants, simply as tax-payers, in their own behalf and in behalf of other tax-payers, have a standing which entitles them to a remedy against a threatened wrongful proceeding which might involve them and the whole people of the county in great expense and confusion, and jeopardize the titles to property. Adam's Equity, 212; 19 Barb.,

166; 2 Caines, 179; 34 Ind., 119; 5 C. E. Green N. J. Eq., 82; 63 N. C., 147.

The decree refusing an injunction is reversed and the cause remanded, with directions to allow the injunction, and for such further proceedings as may be agreeable to equity and the practice of the court.

W. J. WARD ET AL., APPELLANTS, VS. GEORGE W. SPIVEY, APPELLEE.

S. with his family residing on public lands for eight years and having made valuable improvements applied to W. for a loan of $40 to enable him to enter the land. W. loans him the money, but S. not finding the land agent passes the money back to W. and requests him to make the purchase for S., and to hold the deed till the money was paid. W. enters the land in his own name and informs S. that "it is all right." S. continues to reside and make improvements on the land for five years longer until it is worth $2,500, when W. conveys the legal title to D. & M. for $700. The latter knowing of the long possession of S., and of his valuable improvements, and being further informed that S. claimed to own the property subject to the payment of the money due to W., *Held:*

1. That by the transaction between S. and W. the latter became the creditor of S., and held the land as trustee of a resulting trust in favor of S., and as security for the money advanced and interest.
2. That D. & M. having purchased with full knowledge of the settlement, occupancy and improvements by S., and that he claimed the property subject to the payment of the money advanced by W., are chargeable with notice of the trust, and their purchase gave them the same standing as that of W. in respect of the trust.
3. On bill filed against W., D. & M. by S. to redeem, he is entitled to a decree that D. & M. convey to him on payment of the $40 and lawful interest.

Appeal from the Circuit Court for Sumter county.

Spivey filed his bill against Ward, Dozier and Morrisette,

alleging that in 1866 he took possession of forty acres of land then belonging to the Trustees of the Internal Improvement Fund, subject to pre-emption and sale, and with a view of ultimately purchasing it erected a dwelling-house thereon, cleared and fenced a part, cultivated and planted orange trees, and made other improvements, and continued to live upon it and occupy it as a home for himself and family until the present time. In 1875, fearing that some one might enter it, he applied to Ward, who was a relative for a loan of money for the purpose of buying the land. Ward agreed to lend him the money provided the title papers should remain in his hands as security for the loan. Ward knew all the facts relative to the settlement, cultivation and occupancy by Spivey. Soon after Ward saw the agent of the Trustees and entered the land, paying forty dollars therefor, and had the title made to himself, the deed bearing date April 3d, 1875. Soon after that Ward informed him that the land had been entered for his benefit. Spivey did not then know that the entry had been made in Ward's name, and on speaking to Ward about it he said the deed was so taken as security for the money so loaned and advanced, and that he would execute to him a deed on payment of the money. Ward lived but a short distance away from the land, and knew of all the improvements made by Spivey, which were made both before and after the purchase, and Ward never made claim of ownership until June 12, 1880, when Ward conveyed the legal title to Dozier and Morrisette.

That the improvements made on the land by Spivey were worth $1,500; that June 14, 1880, he offered Ward the money he had expended in entering and securing the land and demanded a deed of the same, and Ward refused the money and declined to give a deed. Spivey offers now to pay to Ward, or to Dozier and Morrisette, if they

are entitled to it, whatever sum may be adjudged due him or them on account of the said advance.

The bill charges that Dozier and Morrisette had full knowledge of all complainant's claims and rights before the conveyance to them by Ward.

The bill prays that it be ascertained what is due on account of the advances and purchase by Ward for him, and that the defendants be required to accept the amount and to execute to him a conveyance, and for general relief.

The defendant (Ward) appeared but did not answer. Dozier and Morrisette admit knowledge of the complainant's occupancy of the land from 1866 to the time of purchase by Ward, and of his making improvements by erecting a house and otherwise. They deny any knowledge or information of the agreements between Ward and complainant in relation to the purchase and advances alleged, and say that it was without legal validity; that it appeared of record that Ward had the legal title, and that on June 12, 1880, Ward and his wife executed to them a deed of conveyance of the land, which was recorded June 14, 1880. They have no knowledge or information that Spivey, on June 14, 1880, offered to pay Ward the money he had paid out in securing the land, but they allege notice to complainant of conveyance to them by the record thereof on the day of the alleged offer. They deny any knowledge of the alleged rights of complainant by reason of the agreement with Ward, or of any equities in complainant "that they bought the land in good faith and for a valuable consideration, and paid $350 in cash and gave their note for the balance, and that Ward was considerably in debt and was compelled to sell his property to pay the same;" that Dozier offered, before the purchase by him and Morrisette, to lend the complainant money to buy the land if he desired to purchase the land, but complainant declined the

offer, and complainant was thereupon notified that Ward had offered it for sale and that he and Morrisette had an idea of buying, and yet the complainant did not notify him that he had any claim, right or equities thereto, or desired to purchase, and defendant knew of no right but possession.

There was a general replication and testimony was taken. Spivey testified that he had known Ward forty years, Dozier ten years and Morrisette one year; that he went on the land in 1867, and had remained there ever since, and improved it by clearing, building and planting an orange grove. The value of it is $3,000. "The way the entry came to be made, I borrowed from Mr. Ward to make the entry. I came here on Saturday, understood that Mr. Corley, the land agent, was to be here that day, and I brought my numbers intending to give Mr. Corley my numbers and money, and I remained here till late in the evening and he did not come in, and I asked Mr. Ward if he would see Mr. Corley when he went through and give him the numbers and money. Mr. Ward told me that he would do it, and he said to me about two weeks after, that the title has come, it is all right; and I says to him hold on to the title as security for the money until I pay you your money.

"Defendants, Dozier and Morrisette, had a conversation with me, I think in June, on Saturday evening, about the middle of the afternoon or later, at the south end of Mr. Turner's old store; that was the first conversation between me and Mr. Dozier. Mr. Dozier took me out from Mr. Turner's store, said he wanted to see me. Says he, I have been out to look at your place this evening I asked what he went to look at my place for. He said Ward was trying to sell it to him, and that he would buy it if all parties was willing. And I said to him all parties is not willing.

And he says well, he is going to sell it to somebody, and had you not as lief I buy it as anybody else. Says I to Dozier anybody that knows how that place lies are not going to buy it; says I, he has carried out other parties there, and when they found out how it was they were gentlemen enough not to buy it. I don't recollect much more conversation between us at that time. After that awhile Mr. Dozier went to Mr. Morrisette and Mr. Gibbon, beside Mr. Chaplins. and they were talking there awhile; they then came back to me near Mr. Turner's front porch. I told them then that Mr. Ward had no right to sell the place, the place was mine. Well, Mr. Dozier says, Mr. Ward has a title for it, and I think I will buy it, and I asked him as a Mason not to have anything to do with it. I heard a conversation between Mr. Mabry, Dozier and Morrisette early on Monday morning. I went down to Mr. Mabry's before day, and Mr. Mabry came up very early. We met Mr. Morrisette on the side-walk in Leesburg. Mr. Mabry told him not to pay anything on the place, that I claimed the place. We went to Mr. Dozier's place, called Mr. Dozier out, and Mr. Mabry told him not to pay anything on the place as I claimed the place. When I took possession the lands were worth one dollar per acre. I took possession of it as State land, with the intention of buying it. Since April 3, 1875, I have reset half the grove and cleared six or seven acres; the value of these improvements is about one thousand dollars. In 1877 I offered Ward a young horse; I told him to give me twenty-five dollars and a deed to the place; he declined; he said I was not able to do so and support my family, and he could wait longer. He never demanded payment from me."

J. S. Dyches testified: I heard conversation between Spivey and Ward before the entry of the land. Mr. Spivey

came to Mr. Ward to borrow money to enter the land, as he, Spivey, thought at the time there were other parties who wanted to enter it. Mr. Ward told him he would enter the land for his benefit, and hold the papers until Spivey was able to redeem with interest. It was agreed between them that Ward should do so. Ward has resided within half a mile of the land so entered for the past three years. Mr. Dozier has resided in and about Leesburg since 1866. The value of the improvements on the land on the 12th of June, 1880, was $2,500 to $3,000. I heard a conversation between Ward, Dozier and Morrisette in reference to Ward's surrendering the property he had received from them in payment for the land. I was called on by Mr. Ward to witness the tender. There was some trouble in regard to the payments to be made by Dozier and Morrisette. They wanted to withhold a part of the payment until the trouble between all the parties was settled. Ward refused to have any withheld, and told them he would pay back the amount he had received from them if they would cancel the deed. Mr. Spivey, Mr. Ward and myself have talked this matter over and over. Mr. Ward always acknowledged that Spivey was entitled to redeem the land by paying him the entering fee and interest.

Martha E. Spivey testified that she is the wife of George W. Spivey; lived about three miles southeast of Leesburg for fourteen years. "There was no improvements on the land when we first went upon it. There are now buildings on it, an orange grove, and twelve or fifteen acres cleared. At the time of the entry of the land Mr. Ward proposed to furnish the money and hold the title until the money was paid by Spivey. Spivey was to meet Mr. Corley in Leesburg, and Ward was to let Spivey have the money that day. Mr. Spivey was at that time destitute of means. I had a conversation with Mr. Dozier in regard to himself

and Morrisette purchasing the land from Ward. Dozier said he had come to buy the place if it was agreeable. I told him we did not want to sell; we wanted it for our home. I told him the agreement between Mr. Ward and Mr. Spivey was that Mr. Spivey was to have the entry money and the interest that was due him. Mr. Dozier then said to Mr. Ward that he ought to make me or Mr. Spivey a title. When Mr. Dozier went away he told me I need not be uneasy as he would not buy the place. I told him if he did we would not give him possession. This conversation took place about twelve or one o'clock on the Saturday on which he bought the place at night in the month of June, 1880. Mr. George Ward, W. J. Ward and Mr. Morrisette were present. I asked Mr. W. J. Ward why he brought Mr. Dozier and Mr. Morrisette here. He said they came over to look at this land. I told him I did not want him to bring any more men for that purpose; it looked as if he did not want to come up to his agreement. He said I did not need be uneasy, that he was not going to let Mr. Dozier have the place. I told Mr. Dozier of the agreement between Mr. Ward and Mr. Spivey before the land was entered. Mr. Dozier said he would like to buy the place provided Mr. Spivey and I were willing. He said he would not want the place if it were not for the orange grove."

John W. Thomas testified: I heard Mr. Spivey tell Mr. Dozier not to buy the land unless he bought it from him.

Mr. Dozier said he might as well buy it as anybody, as Mr. Ward would sell it to somebody. This was about three P. M. on Saturday, 12th of June, 1880, at the south side of Turner's old store.

J. W. Lees testified: I am the deputy clerk who took the acknowledgment of a conveyance from Ward and his wife to Dozier and Morrisette. The acknowledgment was

taken on the 12th of June from fifteen to thirty minutes after eleven o'clock P. M. at the residence of W. J. Ward, three or four miles from Leesburg. I went at the instance of Mr. Dozier.

Mr. Cureton testified: I heard a conversation between Mr. Spivey and Mr. Dozier at the east side of Turner's old store, between three and four o'clock P. M., on Saturday. Mr. Spivey said to Mr. Dozier, you nor no other man can get that place until I am satisfied. I was present on the place where G. W. Spivey resided. Mr. Dozier and Mr. Morrisette were there. It was the Sunday evening after they said they had bought the night before. Mr. Spivey says: Mat, I suppose you have bought the place. Mr. Dozier said: I have. Spivey said: I asked you yesterday, as a Mason, not to buy this place, and you promised me you would not. Mr. Dozier said: I was wide awake when I bought this place; I was not asleep.

W. M. Goodson testified: I had a conversation with Dozier and Morrisette in June, 1880. Dozier asked me what I knew about the titles, and I told him that they were in W. J. Ward's name. Dozier said Ward had bantered him to sell it to him and he was going out to look at it; but don't know whether I will buy it unless it is satisfactory to Mr. and Mrs. Spivey. He asked me if I did not think Mr. Spivey ought to have something for the improvements. Had a second conversation with Mr. Dozier on Sunday morning on the Spivey place. He called me one side and told me: I have bought this place, and have not paid the purchase-money. He says: I am sorry for Mr. Spivey, and do not think he ought to lose the improvements: and he wanted him to have pay for them, and wanted me to speak to him and tell Spivey if he would meet him at Leesburg on the next morning he could have him garnished and stop the payment. On Saturday night, between 9 and

10 o'clock, Dozier and Morrisette called at my house, and Dozier said he had bought the place and was going to draw up the writings.

M. W. Dozier, one of the defendants, testified: Ward had been trying to sell me that place two or three months. After examining the records I found it was his land. I saw Mr. Spivey and told him Ward wanted to sell me the place he lived on, and wanted to know if it was all right. He answered me that it was not. I asked him why, and he answered me that that was his business. I asked him if he knew that the title was in Ward's name. He said he did. I asked him what claim he had on it. He said he had done the work that was on it. *I asked him if he owed Ward anything on the place. He said he did.* I asked him why he did not pay it and take a deed. He said he did not have the money. I told him I would lend him the money provided he would pay me interest like I would have to pay if I borrowed. He said he would not do it. I told him if he did not settle that evening I should buy it. We closed the trade that evening with Ward for seven hundred dollars, half cash and half payable in January. We agreed to draw up the deed that evening as Ward wanted to go to Hernando very early Monday morning. He gave us the deed and we paid him early Monday morning. Next morning (Sunday) we went over to the place. I told Mr. Goodson that we had bought the Spivey place, and *asked him if he thought Spivey knew it,* and told him he could tell him of it if he wanted to. Directly Spivey and Goodson came up. Spivey said I suppose you have bought it. I told him yes. He swore and was very mad. I told him I thought he could get pay for his labor; I told him he might save seven hundred dollars, if there was that much due him, if he would be at Leesburg very early on Monday morning. He said he did not want seven hundred dollars

for that place; that he would not take less than a thousand. The seven hundred dollars I meant that we had not paid Ward, nor would until Monday morning; and that he garnishee us. He came down Sunday night, and he asked me to detain the payment until he could get to Mr. Mabry. I did retain it after Ward had sent for it the next morning about one hour. I had agreed to pay Ward by day-break the next morning. A few minutes after I had paid it to Ward Mr. Mabry and Mr. Spivey came to my gate and told me not to pay it. I told them they were too late, I had paid part of it. My information I had in reference to Spivey's interest in the land was from rumor and the fact that Spivey lived on the place, and did not think any sensible man would live on another man's land, for which he had no showing, the length of time he had. I had no direct information that Spivey had any interest in the land. I saw him move on the place in the year 1868; he has resided on the place since he moved there. The trade was closed sometime between one and four o'clock in the evening after I had the conversation with Mr. Spivey. The deed was signed sometime before midnight Saturday night, and I made the first payment sometime between day-break and one hour by sun on the next Monday morning. The first payment consisted of a horse, a mare and a buggy. A few days after I paid fifty dollars. This is all I paid on said land except an account of forty-one dollars, which Ward agreed to allow on settlement; besides, I have obligated to pay for Ward's attorney's fees in this case one hundred dollars. I delivered the personal property mentioned in the first payment to Ward's son-in-law and Ward's wife on Ward's verbal order. When Mr. Mabry notified me that the land was Spivey's I had already told Curry, the son-in-law, and Mrs. Ward where the harness and buggy were, and they could get them whenever they got ready. I considered it a

delivery of the property. When I received the information from Mr. Mabry I do not know whether the property had been taken from my premises or not. I did not go to see nor make any effort to prevent them from taking it. I recollect hearing Ward tell Spivey's wife that *if George would pay him his money he would make him a deed;* that was the day I went to look at the place and before I made the purchase. I think that Ward told me that Spivey got him to enter this land provided Spivey would pay him the money. When Ward was keeping bar-room here he told me that Spivey came to him to get him to enter the land in his (Ward's) name and hold it some three or four years, and if Spivey paid him the money he was to make Spivey a deed, else if he did not pay he said to him, if I don't pay you the land is yours. Ward told me that he told Spivey that he would not do it, and the next time Spivey came to town and brought his wife. She got after him, he was sorry for them, and entered the land at her request so they could have a home, and he had to feed them ever since. When I went to buy the land from Ward he told me he *couldn't get his money out of him,* and that he had let him live on his land so long they thought they owned it, and that the old scoundrel tried to swindle him out of his cattle, and he was not going to wait any longer, and he told Spivey's wife that if they would pay him his money he would make them a deed. The reason the deed was made about midnight on Saturday night was that Ward wanted to go to Hernando early Monday morning.

George P. Lovell testified in relation to lending money to Ward four or five years before and taking a mortgage from him on this land. Does not know that Spivey knew of it. Ward said something about Spivey entering the land, or he had entered it himself, but the land was intended for Spivey.

James G. Gibbons testified that he was present at conversation on the Saturday in question near Turner's store between Dozier and Spivey, Morrisette and others being present. Dozier told Spivey he would buy the land from Ward if Ward would stick to his proposition. Spivey made some threats against Ward if he should sell the place. Dozier asked him why he did not pay Ward and take the deed himself. Spivey said he did not have the money. Dozier offered to let him have the money by paying interest if Spivey would give him a mortgage. Spivey would not do it. Ward then came up, and Spivey went away. Understood in the conversation that Spivey told Dozier that if he bought the place from Ward it would do him no good, as it was his own, and that he would shoot or kill the man that attempted to put him off.

J. B. Morrisette testified to various conversations with Spivey and Ward. The first he heard about Spivey claiming the land was through his wife the day we went out to look at the land on the Saturday we purchased. She said they had done a great deal of hard work on there, and it was wrong in Mr. Ward to sell the place from under them. Heard Spivey say in Leesburg that afternoon that he had improved the land and did not intend to be driven off from it. That whoever bought the land it would not do those persons any good. *Dozier offered to loan him the money to secure the land* if Spivey would secure him for his money. Spivey did not seem inclined to do it. Spivey said that he knew that he could not hold the land by law, and that he would be taken to Lone Oak grave-yard before he would be moved off the place. He (Spivey) said that he went to Ward and told him that there had been two or three parties out there to look at the land, and that he was afraid they would enter him out, and that he would rather he (Ward) would have it than anybody else. He (Spivey)

said, I think, that if he should pay Mr. Ward in a certain time *what he owed him* (don't remember the time) that he (Spivey) was to have the land; that Ward was to make him a deed. Spivey said that Ward entered the land with that understanding. Don't remember that Spivey said the time nor the amount that he was to pay Ward. He (Spivey) said that the time had expired, and he knew he could not hold it by law. He (Spivey) made no *legal* claim to the land at that time. Witness had a conversation with Ward before the purchase of the property from Ward, in which Ward said Spivey told him there were parties prospecting in his neighborhood, and that he wanted Ward to enter the land as he was owing him, and if he never paid him he (Ward) have the land. He (Ward) entered it with that understanding. Thinks that Ward said that if Spivey paid him he would have the land. I was satisfied from what Mr. Dozier told me as to the record, and from what Mr. Ward told me, that the title was good, had no notice of any *legal* claim on the land except that of Ward, nor of anybody else having any interest. All the payments that were made on the land were made by Mr. Dozier. I settled with Mr. Dozier about a week after, and after a conversation between Mr. Mabry and myself. This conversation was an hour or two after Mrs. Ward and Dan Curry took the property out of Dozier's stable and premises. The conversation was about nine or nine and a half o'clock in the morning. I mean, when I said in my examination that I had no notice of any legal claim except what Ward held, to except also what I heard from Mrs. Spivey and Mr. Spivey in previous conversation, which I have related.

Mrs. C. A. Smith testified: I heard Mr. Spivey tell my husband that the title to the land was in Mr. Ward's name, and he was liable to sell at any time.

Question—Did you ever hear Mr. Spivey say that Mr.

Ward had a right to sell the land, and could do so if he chose?

Answer—I heard Mrs. Spivey say so; never heard Mr. Spivey say so. He was not present when she said so. This was about two years ago.

M. H. Mabry testified: I went to the house of defendant, Ward, on the 14th of June, 1880, before 12 o'clock; told Ward that as attorney and agent for Mr. Spivey I had come to pay him the money and interest on it which he had advanced to Mr. Spivey in entering the land on which Mr. Spivey lived. I told him I had $75 legal tender currency which I desired him to accept for Mr. Spivey. Mr. Ward said my tender was too late, he had sold the land to other parties. He said he did not think it was right to do it then. I told him Mr. Spivey wanted him to make a deed of the land to him, and he said he could not do so at that time, because he had sold it to other parties. Early in the morning on the 14th of June, 1880, in company with Mr. Spivey, I went to the defendant, Morrisette, and told him, as Spivey's attorney, not to pay anything to Ward on the land he and Dozier were proposing to buy, or had bought from Ward, as the land was Mr. Spivey's. We then went to Mr. Dozier, and I notified him not to pay any money on the land, as the place belonged to Spivey. It was very early in the morning that we saw Morrisette and Dozier, the sun was less than an hour high. About an hour and a half after we saw them, and so notified them, I saw Mrs. Ward and Dan Curry go to Mr. Dozier's stable and get some harness and a buggy, with one horse to the buggy, and go out of town. The tender of the money to Mr. Ward was not coupled with any condition but unconditional.

J. S. Dyches testified: I was in Leesburg early Monday morning following the sale, and saw Mr. Mabry and Spivey

go to the Mr. Dozier's gate and call him out. Mrs. Ward and Dan Curry had not arrived in Leesburg at that time. I saw them come in afterward. I saw Mrs. Ward and Dan Curry leaving Dozier's and going out of town two hours after I saw Mabry and Spivey go to Dozier's. Just before that I saw them with Mr. Morrisette. This was a long time before Mrs. Ward and Curry came into town. I saw Mr. Mabry tender Mr. Ward a lot of money, the amount was $76. As stated by Mr. Mabry, it included enough to pay him for the entry fee of the land with interest from the date of entry and a little over, but that he tendered him the whole of it. Mr. Mabry said: Ward, here is your money for that land, now make a title of that land to Mr. Spivey. I am not certain as to the precise words of Mr. Mabry. Mr. Mabry in making the tender did not request, demand or exact a deed from Mr. Ward to Mr. Spivey or any one else to the land, as a condition precedent upon the payment to Ward of the money. Mr. Mabry said: Here is your money, now make Mr. Spivey a title to the land. Mr. Ward objected, saying he had sold it.

This is the substance of all the testimony. The court decreed that upon the payment or tender of payment by complainant, or any one by his authority, of the sum of forty dollars with interest thereon from the third day of April, 1875, at the rate of eight per cent., to Dozier or Morrisette, that they convey to G. W. Spivey the NW. ¼ of NE. ¼, Sec. 32, T. 19, R. 24, S. and E., being the land in controversy, with the appurtenances, and further that W. J. Ward, M. W. Dozier and J. B. Morrisette be enjoined from interfering with or intermeddling with G. W. Spivey in the peaceful occupancy of such premises upon such tender or payment as aforesaid being made, and that the defendants pay the costs of this suit. From this decree defendants appealed. It is prayed that the decree be reversed:

1. Because the court held that Ward held the land in trust for Spivey.

2. In holding that Dozier and Morrisette were not innocent purchasers without notice.

3. In holding that they were in no better position than Ward, and that they were not entitled to hold the land upon payment or tender of the money mentioned.

4. In decreeing that they should convey to Spivey upon such tender or payment.

5. In decreeing an injunction.

J. H. Goss for Appellants.

Hocker & Mabry for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

Argument upon this case is hardly necessary to sustain this decree.

Spivey was a squatter on public land, and having made improvements of value and established his home there, fearing to be "entered out" he applied to his relative (Ward) for a loan of $40 to pay for his forty acres and secure the results of the labor of himself and wife for eight or nine years. Ward lent him the money, but the Agent of the Internal Improvement Fund lands not coming as expected Spivey hands the money back to Ward with a memorandum of the "numbers" and a request that Ward pay the money for the land for Spivey and hold the title deed until Spivey should pay him. A few days after Ward informs Spivey that "that the deed has come, it is all right," and Spivey said to him to hold on to the title as security until I pay you your money. When Ward lent Spivey the forty dollars he became Spivey's creditor, and Ward paid for the land with the money borrowed from him by Spivey. Six years more pass until the home of

Spivey becomes worth $2,500 or more. Ward once meantime, in 1877, declined to take his pay in property, saying Spivey was not able to part with the property offered and support his family, and he (Ward) could wait longer. Ward never demanded payment so far as appears here.

In 1880 Dozier and Morrisette wanted Spivey's orange grove, and Ward wanting more money than the $40 and interest, they bought it from Ward for $700. They knew that Spivey and wife had lived upon and cultivated the place as though it was their own. Dozier, who is the negotiator for himself and Morrisette, has known it near fourteen years, Morrisette for one year, and they knew its value. Denying their purposes to Spivey and his wife after looking at the place, and being told by Mrs. Spivey and by others, including Ward himself, that the land had been purchased by the occupants, and by Spivey and his wife that it was their own, and that they would not permit Ward to sell them out and dispossess them, they proceed on the same day, Saturday, at midnight, to have a deed made and acknowledged, (Dozier requesting the officer to go to take the acknowledgment,) and to deliver the purchase price on Monday morning before most people were out of their beds, and before Spivey could, by ordinary diligence, obtain the aid of counsel to save his home and the fruits of his and his wife's fourteen years of labor. The pretext that this midnight haste was on account of Ward's desire to leave that part of the country early Monday morning is a very thin disguise, and it is evident that they were no less anxious to have him get out of the way than he was to go. It is very apparent from the testimony of disinterested witnesses that Dozier was notified by Spivey's counsel of the true state of affairs on that Monday morning, before the delivery of the property, which was the "first payment," and he says himself that he "made

no effort to prevent them (Ward's wife and son-in-law) from taking the property away." Dozier was then a purchaser with notice of the trust given at that moment, and, disregarding it, he takes the land charged with the trust even though the conveyance was actually executed. See Tiffany & Bullard on Trusts and Trustees, 199 *n.* 1, and authorities cited.

Dozier and Morrisette, however, had notice of the long possession and residence of Spivey on the premises. This was sufficient to put them on their guard and to full inquiry into Spivey's legal and equitable claims. (17 Fla., 886.) They were both notified by Spivey and his wife before they closed the bargain that the property was in their possession under claim of interest and ownership, and that Spivey had only to pay what he owed Ward to entitle him to a deed. They knew it from Ward, for they both heard it addressed to them on the very day the deed was executed and before it was written.

Dozier knew of Spivey's interest as he himself shows by offering him the money to pay up *Ward's claim for the money due him on the land*, and Morrisette testifies to this offer also.

The fact that Spivey said he had no *legal* title, and thought Ward could sell him out, can have no bearing upon the case. He may have been as some laymen are, ignorant of equitable rights and remedies. Dozier and Morrisette both relied upon the record as showing the legal title in Ward, and rested upon that even after being notified that Spivey claimed property in the land, thus showing that they were equally ignorant that his equitable rights might be recognized by the courts. They "thought Spivey ought to have something;" and Dozier tried to entrap him into a recognition of Ward's right to convey by endeavoring to get him to garnish the purchasers as for a claim

against Ward. We have no doubt from the evidence that both Dozier and Morrisette were fully informed of the relations of Spivey and Ward, growing out of the entry of the land in Ward's name, and that they were ignorant only of Spivey's equitable remedy.

The result of the whole facts is, that Ward from the time of the purchase was a creditor of Spivey for the amount loaned and advanced, and purchased the land for Spivey and at his request. He then became a trustee of a resulting trust, holding the legal title in trust for Spivey and as a security for the money advanced for him. (Story's Eq. Jur., §1201; 2 Black., U. S., 613; Tiff. & Bullard, 31.) Dozier & Morrisette had ample notice to charge them with the same trust, and they hold the legal title, as did Ward in trust for Spivey, and only as a security for the same money owed by him to Ward. Spivey has the same right to redeem from them that he had to redeem from Ward. He has also the same standing in equity to compel them to give him a title that he had as against Ward. Spivey's position has not been changed. He will be entitled to a conveyance from the holders of the legal title on paying or tendering to them the amount due by his agreement with Ward.

The principles governing cases of this character are more fully discussed in Mathews vs. Porter, 16 Fla., 466; Lindsay vs. Mathews, 17 Fla., 575; McRae vs. McMinn, ib., 876; Runnels vs. Jackson, 1 How. Miss., 358; Boyd vs. McLean, 1 Johns. Ch., 582; Tiffany & Bullard on Trusts and Trustees, 31, 197.

A tender was made to Ward, who said he had sold and it was too late. We are not satisfied by the evidence that the deed had been then delivered or any part of the consideration paid, but we are satisfied that it was not too late when Dozier and Morrisette were notified by the complainant and

his attorney for them to have prevented the delivery of the property which constituted "the first payment." Their conduct throughout the entire transaction savors very strongly of an effort to obtain the property of Spivey, worth $2,000, for a mere pittance, and according to Dozier's testimony, Ward is paying their counsel out of the $700 to defend them in carrying out this questionable enterprise.

The decree of the Chancellor is affirmed in all respects.

JOHN T. MCKEOWN, ET AL., APPELLANTS, VS. T. S. COOGLER, ET AL., APPELLEES.

1. The lien in favor of persons who furnish supplies, &c., to enable a party to cultivate land and raise a crop, need not be given before the supplies are furnished, but is valid if put in writing and recorded afterward, there being no intervening equities or liens in favor of other parties.
2. Fraud is not to be imputed to an honest creditor who is preferred by a failing debtor as against another creditor who had been promised payment by the debtor out of the proceeds of the same property assigned to the former to secure him.
3. Where a writ of attachment is levied upon goods, and afterwards an execution is levied upon the same goods, and the sheriff, before judgment in the attachment suit, advertises the goods for sale under the execution, a court of equity has no jurisdiction to enjoin the sale under the execution at the instance of the attaching creditor, the court at law having ample power to control the process and its officer; and the sheriff acts at his peril in selling the property under a junior levy.
4. After dismissing a bill filed by an attaching creditor to restrain a sale under a subsequent levy by execution, it is improper to decree that the property under levy in the hands of the sheriff be delivered to the debtor. The sheriff is entitled to it by virtue of his levies.
5. Nor should the decree in such case dismiss the attachment, as such dismissal, if proper, should be made in the attachment suit.

McKeown et al. v. Coogler et al.—Statement of Case.

Appeal from the Circuit Court for Hernando county.

John T. McKeown and C. C. Keathley, the appellants, filed their bill for an injunction against Coogler (as plaintiff in a judgment against Lowrey and St. Clair) and Mickler, sheriff, holding an execution issued under said judgment, to restrain the levy and sale of certain tobacco of Lowrey and St. Clair.

The bill alleges that Lowrey and St. Clair being about to engage in cultivating tobacco and other farming operations in 1878 applied to appellants as merchants to furnish supplies to aid them in their business, and agreed to pay for such supplies out of the proceeds of the tobacco to be grown by them during the year, and to hold the tobacco until sold subject to the order of appellants, and though L. & St. C. declined to give appellants a statutory lien upon the crop, yet they promised that they would not give such lien to any other person, and upon the faith of this promise supplies and advances were made by appellants to the amount of $434.

They allege that in November, 1878, after the tobacco raised by L. & St. C. had been gathered and housed, the latter conspired with Coogler to defraud appellants of the amount due them, and gave him a paper purporting to be a statutory lien on said crop for the sum of $597 for advances alleged to have been made by Coogler to L. & St. C. to aid them in the same farming operations; that L. & St. C. also at the same time gave Coogler a confession of judgment for that amount, which confession of judgment is also alleged to be fraudulent, and Coogler in March, 1879, placed his said statutory lien upon record; that on July 16, 1879, appellants commenced suit against L. & St. C. by attachment for the amount of their claim, and the sheriff attached the tobacco. On August 2 Coogler caused his judgment to be entered, and had execution issued and lev-

ied on the same tobacco, and advertised it for sale to satisfy the judgment, all which doings of Coogler are alleged to have been contrived for the purpose of defrauding appellants and depriving them of their equitable lien. They prayed an injunction to restrain the sale under the execution, and that the tobacco be sold under the order of the court and the proceeds paid into court to await the determination of the respective rights of the parties. In an amended bill they pray that the pretended lien be annulled and set aside, at least as to so much thereof as shall be ascertained have not accrued for supplies advanced by Coogler to L. & St. C. to enable them to cultivate the tobacco.

The defendant (Coogler) answered denying all fraud and combination charged, and averred that his claims against L. & St. C. were for goods, wares and merchandise sold and delivered to L. & St. C., and advances made to pay their hands in cultivating the crop of tobacco amounting to $492.67, and for lumber furnished to build a tobacco house and a small house on the place to live in, amounting to $105.27, making in all the sum of $597.94, the amount secured by the lien and by the judgment.

An injunction was allowed upon the filing of the bill. Testimony was taken by the parties and the cause submitted to the court, whereupon a decree was rendered dismissing the cause. It was further decreed that Mickler turn over the tobacco to Lowrey and St. Clair; and, further, that "as the attachment suit of McKeown & Keathley against Lowrey & St. Clair, now pending in the Circuit Court, was submitted at the same time as the cause of McKeown & Keathley was, and as the said attachment suit virtually depends and turns upon said injunction suit, it is ordered that said attachment suit be dismissed."

This appeal is from said decree, which is alleged to be

erroneous in that it should have been decreed that the lien taken by Coogler was taken for the benefit and protection of all the parties furnishing supplies to raise the crop; that the writ of attachment should have been decreed to be a lien having preference to the execution upon Coogler's judgment; that a sale of the tobacco should have been ordered and the proceeds held for *pro rata* distribution among the several claimants, and that it was error to decree a dismissal of the attachment suit.

W. J. Barnett and *J. B. Wall* for Appellants.

J. T. Magbee for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

It is an admitted rule that a debtor may give preference to one creditor over another, even if the debtor is in failing circumstances, to the prejudice of the other creditors, there being no fraud on the part of the favored creditor.

There is in the answer a direct denial of the fraud alleged; not only this but the testimony utterly rebuts any idea of fraud on the part of Coogler, whose claim is shown not only by his own testimony, but by the testimony of Lowrey, to be an honest one for supplies furnished to L. & St. C. to enable them to raise the crop and to build a tobacco house on the place in which to care and preserve the tobacco, and a small, cheap dwelling-house for the use of the place. These may well be presumed from the testimony to have all been necessary to carry on these "farming operations." and therefore come within the act of 1870, (Ch. 1739.) The fact that the "lien" was given in writing and recorded several months after the advances were made cannot affect its validity, no credit having meantime been extended by appellants, and no other liens having intervened. The paper creating the lien in favor of Coogler is in the nature of

a mortgage, and, when duly recorded, is effectual against other liens attaching afterwards.

Upon the case made by the pleadings and proofs we cannot say that any fraudulent intent is established against Coogler in respect to the "lien." Nor do we discover that Coogler has taken any steps looking to the foreclosure of his lien, but has had judgment in an action at law for the amount of his claim, which he is seeking to enforce by a levy upon the property in question.

One of the prayers of the bill is that the sale of the tobacco by the sheriff under the execution be enjoined, because the appellant's attachment was levied upon it before the judgment was entered and the execution issued, and the sheriff threatens to sell under the execution, disregarding the attachment levy.

There is nothing here disclosed which calls for the interposition of the jurisdiction of a court of equity, and it has been held by this court that the remedy at law is ample and convenient, and that, therefore, the chancery court has no jurisdiction thus to interfere with the process of the court of law. Love vs. Williams, 4 Fla., 126; Robinson vs. Yon, 8 Fla., 350.

By the general rules of law and practice, as well as by express statute, the courts of law have ample power to control their process and their officers in matters of this character, and, besides, if the sheriff sell property under a junior levy, disregarding the senior, he does so at his peril.

For the reasons above stated the court did not err in dismissing the bill.

There are, however, two other features of the decree which cannot be sustained: 1. It directs Mickler as "Receiver" to turn over the tobacco to Lowrey & St. Clair. We understand from the record that the tobacco was in the custody of the defendant (Mickler) as sheriff under the

levy of the attachment, and also of the execution. The record does not show any ground upon which the property should be discharged of these levies. Lowrey & St. Clair were not parties in this suit in equity, and there is nothing here disclosed showing that they were entitled to the return of the property to them. 2. The decree further dismisses the attachment suit, the two suits having been submitted together, and "the attachment suit virtually depends and turns upon said injunction suit," as recited in the decree. This is essentially affirmative relief in favor of the defendants in the chancery suit and in the attachment suit, without cross-bill, and after dismissing the suit in equity. This is nowhere recognized or tolerated in chancery practice, except in matters of account, or of such like peculiar character as to constitute an exception to the rule. Sanford vs. Cloud, 17 Fla., 557, 574--5; Wooten vs. Bellinger, ib., 289.

The facts in the chancery suit may properly have controlled the disposition of the attachment suit, and it may have been the duty of the court to dismiss the attachment suit, but if so the order of dismissal is one to be entered in the attachment suit and not in this suit in equity, in which the merits or the regularity of the proceedings in the attachment suit were not before the court.

The decree dismissing the bill with costs is affirmed, but in so far as it directs the delivery of the tobacco to Lowrey & St. Clair, and decrees a dismissal of the suit of McKeown & Keathley against Lowrey & St. Clair, it is reversed and set aside. Each party will pay his own costs upon this appeal.

GEORGE W. LEWTON ET AL., APPELLANTS, VS. JEREMIAH M. HOWER, APPELLEE.

1. In cases of pressing necessity, where the threatened injury is imminent, and the defendant could not be found in time, so that notice could not be served on him, it is not an abuse of discretion on the part of the Judge to allow an injunction without notice.
2. An injunction staying sale of lands wrongfully levied upon under an execution issued upon a judgment at law, upon the ground that the land is exempt from levy and sale, is not an "injunction to stay proceedings at law" within the meaning of the statute requiring notice of application therefor, and a bond in double the amount of the verdict.
3. The levy upon land exempt by law from levy and sale, and advertising the same for sale to satisfy an execution, constitute such an attempt to cast a cloud upon the title as to give a court of equity jurisdiction to enjoin the sale.
4. Section 2296 of the Revised Statutes of the United States, providing that "no lands acquired under the provisions of this chapter [the homestead law] shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," is valid and does not violate the sovereignty of the States, and such lands cannot be subject to levy and sale to satisfy the debts mentioned in the act. The land is granted for the benefit of the family, and not for the benefit of creditors of the grantee.
5. A general judgment recovered for "work and labor and money expended in improving" land which is the homestead of defendant cannot be enforced against the homestead. The Constitution exempts a homestead from forced sale except for taxes, or for the payment of obligations contracted for the purchase of the premises, or for the erection of improvements thereon, or for house, field or other labor performed on the same: but this exception does not include indebtedness for money expended in improving the land.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion.

John W. Price for Appellants.

E. K. Foster for Appellee.

THE CHIEF-JUSTICE delivered the opinion of the court.

Hower filed a bill in equity against the sheriff to enjoin the sale of a certain lot of land upon execution issued on a judgment in favor of Lewton against Hower, the ground of the prayer for injunction being that the land (about 40 acres) is the homestead of Hower and his family. The bill alleges that he obtained a patent for the land from the United States in April, 1880, under the United States statutes regulating the entry of homesteads, (act of Congress of May 20, 1862, Revised Stat. U. S., 1873--4; R. S. of U. S., Second Edition, 1878, Tit. XXXII., Ch. 5; 12 U. S. St. at Large, 392, Ch. 75;) and that the judgment was obtained prior to the issuing of said patent.

The sheriff is about to advertise and sell the land under said execution, and it is claimed that such sale will not divest complainant and his family of such homestead, but will cast a cloud upon the title, &c. Complainant also claims that his said homestead is exempt from sale under said judgment and execution by the Constitution and laws of this State.

Upon filing the bill a preliminary injunction was allowed, to be issued upon the filing of a bond in the penalty of one hundred dollars, conditioned to pay such costs and damages as may be awarded against plaintiff in case the injunction shall be dissolved.

Defendant, Lewton, who becomes a party defendant upon his own petition, demurred to the bill upon the grounds that it does not state such a case as entitles complainant to relief in equity, and that complainant has an adequate remedy at law. The court overruled the demurrer, and defendant answered that he obtained a judgment against complainant for $1,600.93 in 1879, upon which the execution issued. He further answered "that said judgment was obtained for work and labor and money expended in improving said

land" described in the bill, by reason whereof "said land became responsible for the same."

He further answers that the land "was not obtained by complainant under the homestead law of the United States, but under and by virtue of the pre-emption law; that he commuted and paid one dollar and twenty-five cents per acre, as defendant is informed and believes, and did not receive any of said land as a donation from the United States, but as a purchaser under and by virtue of the law of the United States."

Wherefore this defendant alleges that the judgment is and was a lien on said land for the payment and satisfaction of said judgment, and prays that the injunction be dissolved and the bill dismissed.

Upon filing the answer defendant moved that the injunction be dissolved: 1. Because the said injunction was granted and issued without notice first being given. 2. That said injunction was granted without first making and filing a bond in double the amount of the judgment to be enjoined, and paying the costs accrued in the suit wherein the judgment was rendered. 3. For causes shown by the demurrer. 4. For reasons shown by the answer. 5. For other reasons appearing in the proceedings.

This motion was overruled by the court.

From the several rulings of the court the defendants appealed.

I. The statute provides that no writ of injunction to stay proceedings at law shall issue, except on motion to the court or Judge and reasonable notice served on the opposite party or his attorney. (Th. Dig., 453, S. 2.) And no injunction shall issue to stay proceedings at law after verdict or inquest of damages, unless the party applying therefor shall have previously paid all the costs in the suit at law, and shall have entered into a bond, with sufficient

sureties in double the amount of the verdict, "conditioned to pay the debt and interest enjoined and such damages as may be occasioned by the wrongful issuing of said injunction" if the injunction shall be dissolved or the bill dismissed. (Th. Dig., 454, S. 5, as amended by Ch. 526, Laws of 1852, McClellan's Digest, Ch. 16, §§14, 18.) The only bond exacted was a bond in a penalty of one hundred dollars, no notice was given of the application for the injunction, but an affidavit was presented to the Judge stating that the reason why no notice was served was that he was unable to find the defendant, and he feared that the injury might in part be effected before notice could be served. The Judge, deeming the reason sufficient, allowed the injunction without notice. This is generally allowed in cases of pressing necessity, where the threatened mischief is imminent, and we cannot say that he abused his discretion in allowing the preliminary injunction without notice, the whereabouts of the defendant not being then known. (Kerr on Jug.,* 545.) The statute requiring notice, as we shall see, does not apply to this case.

II. The next question is whether the injunction in this case was sought "to enjoin proceedings at law" in the true sense of the statute, and whether, therefore, a bond to secure the payment of the judgment and costs and other damages was required by the statute. The statute was passed with reference to what was understood to be the "enjoining of proceedings at law" according to the practice of the courts of equity. This jurisdiction of the courts of equity was invoked to prevent a party who by fraud, accident or mistake had obtained an unconscientious advantage over another from enforcing such advantage in a court of law, and though the jurisdiction of the latter was admitted, the ground of the injunction is that the parties are making use of that jurisdiction contrary to

equity and good conscience. (2 Daniells' Ch. Pl. & Pr., 5 Am. Ed. by Cooper, 1624.) In such cases, and in other emergencies, the jurisdiction of chancery was invoked to stay the entry of judgment, to stay the issuing of execution thereon, or to stay the enforcement of the execution upon a judgment for the purpose of giving opportunity to show why in conscience the judgment ought not to be entered, or why it should not be enforced. In numberless instances where parties by fraud, accident or mistake have been led into legal liabilities, or where they have been prevented by the loss of evidence or its concealment from making a valid defence at law, or where a pre-existing defence at law was not in due time known to defendants, and in like instances familiar to courts of chancery, they interposed a stay of proceedings to enable parties to show why judgment at law should not be had, or why it should not be enforced.

The "stay of proceedings at law," in the language of our statute, by injunction, was without question intended to refer to the interposition of the equitable power of the court of chancery to stay judgment or the enforcement of a judgment at law, to the end that the equitable rights and liabilities of parties could be inquired into, and ultimately permanently enjoined in whole or in part.

The object of exacting security for the whole amount of a verdict or judgment in case of such stay of proceedings was to secure the plaintiff his judgment if he was in equity entitled to it.

And it is entirely beyond doubt that the stay of proceedings at law, the stopping of the wheels of the courts of law, was neither intended to include nor does it include the enjoining of parties and officers from selling property which may not be subject to sale. There would be no sense in requiring a party to give a bond for three thousand dollars conditioned to pay this judgment of sixteen hundred merely

for the privilege of trying the question of the exemption from levy of property worth $500.

No question of the validity of the judgment is involved, nor is the execution of the judgment stayed, but a mere controversy arises as to the legal liability to sale of the property levied on by the sheriff. There is no reason for applying the statute in question to this kind of controversy, and there being no reason for it in the law, and no legitimate end to be subserved by it, there is no such rule. The statute does not apply. In the language of Chancellor Walworth, 8 Paige, 81, the statute of New York being in substance like our own: "The reasons upon which this statutory provision is founded are not applicable * * where the object of the injunction is not to stay proceedings in the suit at law against the defendant therein, or against his property upon which the judgment or execution is a *legal lien.*"

For these reasons there was no error in holding that the bond mentioned in the statute referred to was not required in this case to authorize the injunction.

III. The third ground of the motion to dissolve the injunction is that the bill of complaint does not disclose a case for the interposition of a court of equity, and that the remedy at law is adequate.

While a defence might be made in ejectment brought upon a deed under a sale on execution if the property was not liable to be legally sold, yet such a sale and deed would cast a cloud upon the title, and not only affect the market value of the land but cause unnecessary anxiety and disquiet to the owner and his family. In such cases the equity courts have very uniformly interposed to prevent or remove such cloud. Irwin vs. Lewis, 50 Miss., 363; Dows vs. Chicago, 11 Wallace, 110; Petit vs. Shepherd, 5 Paige, 501; Key City Gas Light Co. vs. Munsell, 19 Iowa, 305; Budd vs. Long, 13 Fla., 288.

In the present case the bill shows that the complainant is the head of a family residing in this State upon the land described, that it was acquired under the homestead laws of the United States, and is exempted from sale under the said homestead laws, and that it is also exempt from levy and sale under the Constitution and laws of this State upon the execution issued on the defendant's judgment. This being the case made by the bill the demurrer was not well pleaded and was properly overruled.

IV. It is insisted that the injunction should have been dissolved upon the answer.

The bill states that the complainant obtained a homestead on the land under the homestead laws of the United States, and that he obtained a patent therefor under said homestead law cited by him in the bill in 1880 after the rendition of the judgment. The answer says the land was not obtained under the homestead laws of the United States but under the pre-emption laws, that complainant commuted and paid for it, and did not receive it as a donation but as a purchaser under the laws of the United States.

The homestead laws of the United States passed in 1862, and incorporated in the Revised Statutes, authorizes the entry of any quantity of land not exceeding one hundred and sixty acres for the purpose of actual settlement and cultivation by any citizen twenty-one years of age or the head of a family.

Section 2296, R. S., reads thus: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

Section 2301 (same chapter) provides that nothing in this chapter shall prevent any person who has availed himself of the benefits of the first section (Sec. 2289, R. S.) from paying the minimum price for the quantity of land

so entered at any time before the expiration of five years and obtaining a patent therefor from the government as in other cases directed by law, on making proof of settlement and cultivation as provided by law granting pre-emption rights.

The answer does not deny that the land was entered under the homestead law, but alleges that the complainant *obtained* the land by commuting and paying for it under the pre-emption laws. That may be true, yet the section last referred to authorized him, he having entered under the homestead law, to obtain his patent *in the manner* required by the pre-emption laws.

And while the title of the complainant may have been obtained, so far as the patent is concerned, under the laws regulating the issuing of the patent as provided by the law granting pre-emption rights, on payment of the price, yet the homestead law declares it to be exempt from sale to satisfy any pre-existing debt.

The answer is vague in that it does not designate the act of Congress under which he alleges the complainant obtained his patent, and thus show that it was not obtained under the homestead law. If the title of the complainant was not obtained under the provisions of the homestead law of the United States, the land is not exempt from levy and sale by virtue of the acts of Congress. If the title was obtained under the provisions of the act relating to homestead entries, before cited, the land is exempt from such levy and sale for antecedent indebtedness if it is occupied as the homestead of the complainant and his family as he alleges in his bill. This principle is sustained in 13 Wallace, 99. This precise question was so decided in Russel vs. Lowth, 21 Minn., 167, in which it is held that the section exempting homesteads acquired under it from sale for debts antecedent to the patent is constitutional and valid and does

not violate the sovereignty of the State. The case of Gile vs. Hallock, 31 Wis., 523, also presents the identical question. The court says: "The question seems to be whether the declaration of such exemption, made in order to induce settlement upon and cultivation of the soil, is the exercise of a power granted by the words, 'to make all needful rules and regulations.' It is obvious that what may or may not be a needful rule or regulation is a question vested very largely if not entirely in the sound discretion of Congress. Congress is to judge and determine for itself what may or may not be a needful rule or regulation in the premises, and such judgment having been exercised and rules and regulations made, it is not for the courts to overrule its determination." The court in the same case holds that a sale of such land under an execution issued upon a judgment for a debt contracted before the issuing of the patent creates such a cloud upon the title as that equity may be invoked to remove it. The court in 13 Wallace, 99, says with respect to the power of Congress over the public domain: "Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made."

Lands acquired under the homestead act of Congress are granted for the benefit of the grantee and his family and not for the benefit of antecedent creditors.

Counsel for appellant contended that the exemption clause referred to is not effective to relieve the property from the operation of the laws of the State in respect to judgment liens, after the issuing of the patent, and refers to the opinion of this court in Morse vs. Garrason, 4 Fla., 460, when a judgment had been recovered in 1847 and a patent issued in 1849 under the "armed occupation act" of 14th August, 1842. The act provided that "all sales, gifts,

devises, agreements, bonds or powers to sell, transfers or liens whatever, private or judicial, of the lands or any portion thereof acquired by this act, made at any time before patents shall have issued for the same shall be utterly void and without effect." The court holds that the evident purpose of the act was to prevent any collusive sale or other alienation of the inchoate title, but did not operate to prevent a sale under the laws of the State to satisfy a pre-existing judgment, not collusive or created for the purpose of evading the provisions of the act. The court remarks that "we should be constrained to regard the prohibition as abortive and nugatory if the intention had been to have placed the patented lands beyond the reach of all pre-existing creditors."

The policy of protecting the homestead by the exemption from forced sale of a limited quantity of land had not been adopted at the time of that decision. Since then Florida, and nearly if not quite all the States, have engrafted such homestead exemptions into their constitutions and statutes. The act of Congress exempting from forced sale for debts certain lands granted as a homestead for the benefit of a family is in full harmony with our constitutional provisvisions, and we cannot regard the preceding quotation as expressing the law of the State in view of the homestead policy now adopted.

V. Appellant insists that the land in question is liable to sale under the Constitution and laws of this State regulating the homestead exemption because "the judgment was obtained for work and labor and money expended in improving the land," and for labor performed on the same.

Without reference to the question of exemption under the act of Congress, this claim is untenable. The land is owned and occupied "by the head of a family residing in this State," and consists of less than forty acres. It is,

therefore, a homestead. It is exempt by the terms of the Constitution "from forced sale under any process of law," except "for taxes or for the payment of obligations contracted for the purchase of the premises and for the erection of improvements thereon, or for house, field or other labor performed on the same."

The allegation in the answer that the judgment was obtained for work and labor and money expended in improving the land, and for other labor performed on the same, does not bring the plaintiff's judgment within the exception. A general judgment for money borrowed for or expended in making improvements, together with other indebtedness, which might by appropriate proceedings have been made a charge upon the land, cannot be enforced against the claim of exemption under the provisions of the Constitution. A general indebtedness cannot be united and commingled with claims which might otherwise be enforced, so as to create a charge upon the land for the whole. To allow this would be practically a fraudulent evasion of the protective features of the Constitution.

The provision of the Constitution that the homestead may be liable "for the payment of obligations contracted for the purchase of the premises, or for the erection of improvements thereon," mut be strictly construed. (3 Minn., 53.) "An obligation contracted for the erection of improvements" is an obligation to pay for labor and materials bestowed and used in the construction of such improvements.

An indebtedness for money borrowed to purchase materials, or to pay for labor bestowed in improving lands, or money expended in the purchase of such materials, or in payment for such labor, is not an obligation contracted "for the erection of improvements," nor an obligation contracted for such labor, and is not within the exceptions of

the constitutional provisions. The contract in such case is to repay money loaned or expended, and not a contract to pay for the erection of improvements, or for labor on the premises.

The purpose of the exception of "obligations contracted for the erection of improvements" and for "labor performed on the same," so that a homestead is liable for such debts, though not for debts generally, is that those who have furnished the materials and performed the labor may have their remedy upon the property they have in part created and enhanced by the bestowal of their labor and property, and in the absence of any provision giving the lender of moneys, which have been expended upon the property, the benefit of the exception, the courts are powerless to extend it to them.

Upon the case as presented by the bill and answer the property levied upon is not liable to levy and sale under the execution and judgment mentioned in the bill, and the decrees enjoining the same, overruling the demurrer to the bill and refusing to dissolve the injuuction to the answer filed are affirmed.

WILLIAM H. T., PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA EX REL. M. C., DEFENDANT IN ERROR.

1. A motion for a new trial will not be entertained at a term subsequent to the one at which a cause was tried and a verdict rendered. In order to obtain a new trial on such motion the statute must be complied with. McClellan's Digest, 453.
2. An affidavit made by the complainant in a case of bastardy, alleging that she is a single woman, has been delivered of a child, which by law is held a bastard, and that the person charged is the father, is sufficient under the statute to authorize the issuing of the process provided thereby. It is not necessary to allege that she was a single woman prior to such delivery; that is a matte. for proof upon the trial.

3. It is not necessary to arraign the defendant on the trial. He answers to the complaint in the Circuit Court, and from thence the proceedings are conducted as in civil actions. Prosecutions under this statute partake partly of a criminal and partly of a civil character. In getting into the Circuit Court it partakes in form of the criminal, when there it is a civil action. It was not designed to punish the accused for crime, but to make him contribute to the support of the child.

Writ of Error to the Circuit Court for Madison county.

The facts of the case are stated in the opinion.

W. R. Boyd and *F. W. Pope* for Plaintiff in Error.

The Attorney-General for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

On the 20th day of October, 1880, one Maggie C. complained before Robert M. Witherspoon, County Judge and *ex-officio* Justice of the Peace for the county of Madison, that she had been delivered of a bastard child, and that William H. T. was the father of said child, and made her affidavit, which is in the words as follows:

"State of Florida, County of Madison.

"Before the subscriber, Robert M. Witherspoon, County Judge and *ex-officio* Justice of the Peace in and for said county, personally came Maggie C * *, who, being duly sworn, says that on the 19th day of May, A. D. 1880, in the county and State aforesaid, the deponent, being a single woman, she was delivered of a girl child, which by law is deemed and held a bastard, and that William H. T * * is the father of said bastard child. MAGGIE C * *."

"Sworn to and subscribed before me this 20th day of October, A. D. 1880.

ROBT. M. WITHERSPOON,
County Judge and *ex-officio* Justice of the Peace."

On such affidavit the County Judge and *ex-officio* Jus-

tice of the Peace issued his warrant for the arrest of the said William H. T., and such proceedings were thereupon had that the said T. gave his bond with sureties in the sum of five hundred dollars, conditioned for his appearance at the next term of the Circuit Court to be held in and for said county of Madison.

That on the 12th day of April, A. D. 1881, the parties appeared in the Circuit Court, and such proceedings were had that issues were made up by the court as follows:

"I. Whether Maggie C. was delivered of a female child at the time alleged in the affidavit, to-wit: on 19th day of May, 1880, in Madison county, Fla."

"II. Whether said Maggie C. is now and was then and there a single woman."

"III. Whether said child is now living in the county of Madison, Fla."

"IV. Whether William H. T., the defendant, is the father of said child of which the said Maggie was delivered as aforesaid."

The cause was tried and the jury found "that Maggie C. was a single, unmarried woman on the 19th day of May, 1880; that on said 19th day of May, 1880, she gave birth to a live girl child; that said child is now living, and that William H. T. is the father of said child."

The defendant's counsel then moved in arrest of judgment for the following reasons:

1. Because the affidavit of complainant does not allege the relator to have been a single woman at the time of conception, or at any time prior to the alleged delivery of said child.

2. Because the affidavit of complainant is insufficient and defective, and does not set forth the necessary ingredients of said charge.

3. Because the verdict rendered in said cause does not

find the relator to have been a single woman prior to alleged delivery of said child.

4. Because this court has no jurisdiction of said charge as appears by the record.

5. Because of other defects and irregularities on the face of the record.

The record shows that by order of the court this motion went over to the next October term of the court for argument; that it was then argued and overruled by the court. The defendant's counsel then, at the October term of the court, the case having been tried, and the verdict rendered at the April term preceding, moved for a new trial upon several alleged grounds. This motion for new trial was also overruled.

Exceptions were taken to the ruling of the court on both of said motions, and the case is in this court on a writ of error.

The motion for a new trial was made at a term subsequent to the one at which the trial was had. It does not appear that it was entered upon the motion docket, or the reasons filed with the clerk during the same term and within four days after the verdict was rendered; but it does appear that no movement for the purposes of procuring a new trial was made until nearly six months after verdict. The statute is explicit upon this point. "No motion for a new trial or in arrest of judgment shall be made unless the party intending to make the same shall file his reasons with the clerk in writing, and cause his motion to be placed upon the motion docket within four days after the verdict shall have been rendered, and during the same term." (McL.'s Dig., 453; 16 Fla., 70, 199.) The record states "that the court did consider and decide that the said motion should not be granted." As in the case of Dupuis vs. Thompson, 16 Fla., 70, "the entry might have stated more clearly that

the court refused to consider the motion, still a fair construction of the record gives it that effect." There is, therefore, no error in the denying the motion for a new trial.

The motion in arrest of judgment was entered at the April term of the court and by order of the court was continued to the fall term, when it was argued and decided.

The statute under which these proceedings were had provides: "That when any single woman who shall be pregnant or delivered of a child, who by law would be deemed and held a bastard, shall make a complaint to any one or more Justices of the Peace for the county where she may be so pregnant or delivered as aforesaid, and shall accuse any person of being the father of such child, it shall be the duty of such Justice or Justices to issue a process," &c. The counsel for the defendant in his reasons for arresting the judgment first says that the affidavit of the complainant does not allege the relator to have been a single woman at the time of conception, or at any time prior to the alleged delivery of said child. The statute does not require such allegations. It requires only an allegation that she is a single woman and pregnant, or that she has been delivered of a child. It provides for a trial upon issues to be framed, and upon such trial the person accused of being the father has full opportunity to be heard by counsel and witnesses. The affidavit of the complainant upon which the process was issued distinctly alleges and charges that she being a single woman has been delivered of a child which by law is held a bastard, and that the defendant is the father. There is nothing requiring a specific allegation of the woman having been single at the time of conception, or at any other time prior to the delivery of the child, to be found in the statute. The affidavit in this case is clearly sufficient to warrant the issue of the process by the Justice

of the Peace. (McL.'s Dig., 126.) What is said in this connection with reference to the first ground of the motion sufficiently covers the second ground.

The third ground that the verdict does not find the relator to have been a single woman prior to the alleged delivery of the child is equally untenable. The statute does not require it, and although it was a fact embraced in the issues it was not material to have been specially found. The jury did find that the relator was a single woman at the time of the delivery, and this after a trial at which the defendant was represented by counsel. There is none of the evidence in the case before us, and what the proof was we are not informed, but undoubtedly the interests of the defendant were carefully attended to. Williams vs. The State, 29 Ala., 10; Austin vs. Pickett, 9 Ala., 102.

The fourth reason assigned is, that the court had no jurisdiction of the case as appears by the record. The record shows a compliance with the statute in every respect, so far as we can see. The affidavit of complainant was made before a Justice of the Peace, the defendant was arrested, gave a bond for his appearance at the next term of the Circuit Court, at which term he appeared, issues were framed, and he was tried. The jurisdiction appears to have been complete, and the counsel has failed to point out any defect in the record that shows the want of such jurisdiction.

This disposes of the alleged errors assigned in the motion in arrest of judgment.

The counsel in his brief here makes the further point, and alleges it as error, that the defendant was not arraigned before trial, and insists that inasmuch as this is a *quasi* criminal charge he should have been so arraigned. In the case of John D. C. *ex rel.* Julia V. H., 16 Fla., 554, this court held that under the statute authorizing proceedings in bastardy an action was *quasi* criminal; that is, it bore a

resemblance in its inception to criminal proceeding. It was so far criminal in its nature as to cause the arrest by process of the defendant, and if upon examination sufficient cause appeared, that such defendant should give a bond with good security for his appearance before the next Circuit Court for the county; that such court had then complete jurisdiction, and cause an issue to be made up and tried by jury; that then the trial is had in the same manner and after the same form as provided for trials of other civil causes in that court. The affidavit of the complainant, taken by the Justice of the Peace, is filed in the Circuit Court and becomes the complaint which defendant must answer. It is not necessary to arraign the defendant, but he answers the complaint, and from thence the proceedings are of a character and are conducted in the manner of a civil action. Prosecutions under this statute partake partly of a criminal and partly of a civil character. It was not designed to punish the accused for a crime, but to make him contribute to the support of the child. In getting into the Circuit Court with the case it partakes of the criminal in form, when there it is a civil action.

The judgment is affirmed.

MOSES JONES, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. In case of a deficiency in a grand jury, arising from the fact that some of the number named in the venire issued to the sheriff or other officer have not been summoned, or that a portion so summoned have been excused by the court for the term, it is discretionary with the court to order that such deficiency be filled, either from the list furnished by the County Commissioners, by drawing from the box, or from the body of the county.

... in the night time, *with intent* to c...
... goods and chattels, it is not necessary ...
... goods or chattels were *intended* to ...
... owner thereof.

... propositions of law which counsel ...
... charge to the jury to be in writing, and ...
... thereon in writing "refused," with ...
... Judge, no evidence appearing to the c...
... that the court did conform to the law in ...
... jury his ruling thereupon as present...
... to the jury as given or refused."

... the Circuit Court for Leon county.
... 1028, McClellan's Digest, page 62 ...

... cause the whole number of any grand ...
... to be summoned, the Judge of t...
... the clerk to draw grand and petit ju...
... venire to the sheriff or other office...
... to summon a sufficient numbe...
... petit juries."
... the case are stated in the opinion.

... Plaintiff in Error.

... *General* for The State.

... ALKENBURGH delivered the opinion ...

... this case shows that on the 21st day o...
... a Circuit Court was held at Talla...
... county of Leon, and that on that day th...
... previously issued for eighteen grand jurors t...
... term was returned by the sheriff of tha...
... such return it appeared that three of the ...
... such venire were not found in the county, ...
... other fifteen had been duly summoned; that

on the same day four of the persons named in the venire and so duly summoned were, by the court, excused for the term, making a deficiency in the number requisite to form a grand jury. The court directed another venire to be issued, commanding the sheriff to return forthwith from the body of the county seven qualified persons to make up such deficiency. On the same day the sheriff executed the said writ by summoning seven persons so to serve as grand jurors for that term of the court and made his return. The grand jury was empanelled on the same day, consisting of seventeen persons, among whom were the persons so summoned by the sheriff on the second venire facias issued to him. On the 23d November they presented an indictment against the Plaintiff in Error, alleging that he, on the 20th day of August, 1881, "in the night time of said day, to-wit: at the hour of eleven o'clock in the evening of said day, with force and arms, at and in the county of Leon aforesaid, the dwelling-house of one John A. Pearce, there situated, feloniously and burglariously did break and enter with intent to commit felony, to-wit: to steal, take and carry away money, goods and chattels of the value of more than twenty dollars, against the form of the statute," &c.

To this indictment the defendant filed his plea in abatement, and says "that the whole number of the grand jury drawn for this term of the court not having been summoned, the court did not direct the clerk to draw a sufficient number to complete the said grand jury from the list furnished by the County Commissioners as provided by law, and to issue a venire for the summoning of the persons so drawn, but that portion of said grand jury were summoned by the sheriff of said county without having been so drawn."

To this plea the State's attorney demurred and the plea was overruled by the court. The defendant was then tried

and found guilty. The counsel for the defendant asked the court to charge the jury that, "the indictment to charge larceny or intent to commit larceny after the breaking must allege the name of the owner, and specify the particular articles stolen, or attempted to be stolen," and also that "if no larceny or intent to commit larceny is alleged in the indictment, the jury must acquit the prisoner." Such instructions were refused by the court.

The counsel for the defendant then moved for an arrest of the judgment upon the following grounds:

1. The whole number of the grand jurors drawn for this term of the court, and for whom a venue had been issued, were not summoned, and a portion of said grand jury were summoned by the sheriff without their names having been drawn by the proper officers according to law.

2. There was no larceny set forth in said indictment, because—1st, the moneys, goods and chattels alleged as having been stolen were not specifically mentioned, and 2d, there was no ownership alleged.

This motion was denied by the court, and the defendant brings his case here by writ of error and assigns errors in substance as follows:

I. The whole number of jurors drawn for the term of the court not having been summoned, it was the duty of the court to direct the clerk to draw a sufficient number to complete the jury from the list furnished by the County Commissioners in the same manner as provided by law for the drawing in the first instance; that the court erred in directing a venire to issue to the sheriff to make up the deficiency by summoning seven qualified persons from the body of the county, and that the plea in abatement should have been sustained.

II. That the court erred in holding that it was unnecessary in an indictment for burglariously breaking and enter-

ing into a dwelling-house in the night time, with intent to steal, that a description of the property stolen or attempted to be stolen should be given.

III. That the court erred in ruling that it was unnecessary to charge ownership of the property so stolen or attempted to be stolen.

IV. That the court erred in this that the counsel for the defence having presented to the Judge instructions in writing on points of law to be given to the jury, the Judge did not declare in writing to the jury his ruling thereupon as present, and pronounce the same to the jury as given or refused.

The first alleged error brings up the question of the legality of the grand jury, and the plea in abatement was a proper method to raise this question before pleading in bar. The counsel for the plaintiff in error insists that there having been a failure on the part of the sheriff to find within the county and summon the whole number of grand jurors named in the first venire, and the court having excused from duty some of those who had been duly summoned, that the deficiency in the panel should have been made up by drawing from the box containing the list of three hundred in the same manner as the original jury were drawn, and cites Section 32 of Chapter 1628, Laws 1868. On the 20th day of February, 1875, (Chapter 2046,) an act was approved, which charges the effect and operation of the section so cited, if it does not entirely repeal such section. That act in section one provides: "That whenever, for any cause, no grand or petit jurors have been drawn and summoned in the manner provided by law for any regular terms of the Circuit Courts of this State, it shall be lawful for said courts, or the Judges thereof, to order the clerks of said courts to issue special venires for a suffcient number of such jurors for said terms to be directed to the sheriff,

* * * * commanding him to summon from by-standers, or the body of the county at large, the number of qualified jurors so ordered." Without reference, however, to the act of 1875, the section 32 so cited does not bear the construction put upon it by the counsel for the plaintiff in error. The words "whole number" in that section do not mean as there used a mere deficiency in the panel, but must be construed to mean the entire panel. It provides for a case where no venire has been issued by the clerk in accordance with law, or there had been an entire failure upon the part of the proper officer to execute it. When a venire has properly issued and been executed and returned, and the requisite number of persons to constitute a grand jury do not appear and answer according to the requirements of the writ, then there is a deficiency which is to be filled in accordance with section ten of the same act. This section provides that "in case of a deficiency of grand jurors in any court writs of venire facias may be issued to the proper officer to return forthwith such further number of grand jurors as may be required."

The counsel also cites Gladden vs. The State, 13 Fla., 623. This case was decided before the act of 1875 was passed, and endorsed what we have in this opinion said. In that case the record disclosed the fact that there was a failure to summon the *whole number of petit jurors*, and the court held that in such case, under section 32 of the act of 1868, the jurors must be drawn and summoned "according to the provisions of this chapter," that is from the list as provided by the County Commissioners. It will be seen that section ten above cited, providing for the summoning of persons to fill deficiencies, applies only to grand jurors and not to petit jurors. If an entire grand or petit jury may be drawn and summoned from by-standers or the body of the county, as provided by the act of 1875, we can see no

impropriety of permitting deficiencies in grand juries to be filled in this way. In the case of Dukes vs. State, 14 Fla., 499, this court held that when there was a deficiency of grand jurors it was not error in the court to restrict the sheriff, in the execution of the venire, in his selection to persons drawn from the list furnished by the County Commissioners. It says: "There is no statute which prohibits this. There is no statutory provision to the effect that this selection shall be left to the discretion of the officer." * * * "In the absence of any statute controlling the matter, we think it was clearly within the power of the court to adopt a rule, and we think the rule here adopted, being in entire conformity with the theory upon which the whole system is based, was eminently proper." It would therefore seem to be discretionary with the court whether the sheriff or other officer executing the writ shall be restricted in filling such a deficiency to persons drawn from the lists furnished by the County Commissioners, or may summon them from the body of the county. In the exercise of such discretion in this case, the court by its writ commanded the sheriff to summon sufficient jurors to make up such deficiency from the body of the county, as by law he had the right to do.

The second and third errors assigned are that the court erred in ruling, first, that it was unnecessary in such an indictment to give a description of the property stolen or attempted to be stolen; and, second, that it was unnecessary to charge ownership of such property.

The statute under which this indictment was found provides that "whoever breaks and enters a dwelling-house in the night time with such intent, (*i. e.*, 'with intent to commit the crime of murder, rape, robbery, larceny or other felony,') or having entered with such intent, breaks such dwelling-house in the night time," &c., shall be punished,

&c. The indictment charges that the defendant, "the dwelling-house of one John A. Pearce, there situate, feloniously and burglariously did break and enter with intent to commit felony, to-wit: to steal, take and carry away money, goods and chattels of the value of more than twenty dollars," &c. There is no evidence taken upon the trial before us, as there was no bill of exceptions made up, but unless the defendant did steal, take and carry away money, goods or chattels, it would be very difficult to charge or prove what particular articles of property he intended to steal, or who was the owner of such property. The question of such intent must be left to the jury to be determined from the evidence produced on the trial. If the evidence did show that certain money, goods and chattels were taken and carried away, that would be conclusive as to the intent to commit a crime; and if it also showed that such money, goods and chattels belonged to John A. Pearce, the owner of the house, that would show the ownership. The charge of burglary with intent to commit a larceny will be supported by evidence of a larceny actually committed. But we are not left entirely in the dark in this matter so far as authorities are concerned. In the case of Spencer vs. The State, 13 Ohio, 401, the precise question has been decided. The court there well says: "If it be necessary to specify with certainty the particular goods and chattels which the burglar designs to steal, when the felonious breaking is made with such guilty intention, but he is arrested in his progress before a larceny is actually committed, it appears to us the main object of this statute would be in a great measure defeated. Every material averment in an indictment must be proved. The law would not presume an intention to select one article in preference to another. * * * Upon what principle would it be presumed, if goods and chattels were specified, that they were the ones intended to

be taken in preference to others? And how could this material fact, thus averred, be proved? Very few, it is perfectly clear, would be the cases in which it could be done, though the general intent to steal might be perfectly manifest from the time, manner and other surrounding circumstances of the entry. We are therefore of the opinion it is not necessary to the sufficiency of the indictment, under this statute, that it should describe any specific goods and chattels intended to be stolen." The same reasoning applies to the ownership of the property. It would be equally difficult to determine, where the dwelling was the home of a large family or a number of persons, not only what but whose particular chattels or money were sought to be taken by the one making such burglarious entry. The evidence only can determine the property, if any were taken, and the ownership of such property. We think, therefore, that the allegations in the indictment in this respect were sufficient.

The fifth and last assignment of error is as follows: "That the counsel for the defence having presented to the Judge instructions in writing on the points of law to be read to the jury, the Judge did not declare in writing to the jury his ruling thereon, or present and pronounce the same to the jury as given or refused." There is no evidence of such dereliction of duty on the part of the Judge; on the contrary the record contains the propositions of law upon which the defence asked the court to charge the jury in writing, and immediately thereunder are written the words "Refused, December, 1881," and signed by the Judge. The ruling of the court was in writing, and there is no evidence in the record that he did not read his written endorsement to the jury, even if that was necessary.

Judgment affirmed.

PLEASANT ROBINSON, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. An indictment for perjury should charge that the oath taken by the defendant was wilfully false, and to matter material to the issue. As to the degree of materiality, it is enough if it is circumstantially material, though not by itself sufficient to establish the issue.
2. The form of the sentence of a prisoner convicted of a crime, the punishment for which is imprisonment in the State Prison for any term, should be "that he be imprisoned by confinement at hard labor," unless the court shall otherwise order as provided by law. McClellan's Digest, 451.

Writ of Error to the Circuit Court for Madison county.

The facts of the case are stated in the opinion.

F. W. Pope and *H. J. McCall* for Plaintiff in Error.

The Attorney-General for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an indictment which charged the defendant, Pleasant Robinson, with perjury, on the trial in the Circuit Court held in the county of Madison of one John Robinson, charged with aiding a prisoner in custody in attempting to escape from a person having the lawful custody of such prisoner. The jury found the defendant guilty. The counsel for the defendant then moved in arrest of judgment, which motion was denied. The case is in this court on a writ of error, and the errors assigned are as follows:

1. The indictment does not charge the offence or crime of perjury, in that the defendant was not sufficiently put on his guard.

2. The indictment does not allege material matter, or show said matter to be material.

3. The sentence of the court is contrary to law.

The court sentenced the prisoner, Pleasant Robinson, to be confined at hard labor for the term of five years in the State Penitentiary.

The statute under which this indictment was found reads as follows: "Whoever, being authorized or required by law to take an oath of affirmation, wilfully swears or affirms falsely in regard to any material matter or thing respecting which such oath or affirmation is authorized or required, shall be deemed guilty of perjury, and shall be imprisoned," &c. This court have held in Miller vs. The State, 15 Fla., 577, that the oath taken by the defendant must not only be false, but that it must be wilfully false, and to matter material to the issue, and that it is necessary to so charge the offence in the indictment. As to the degree of materiality it is enough if it was circumstantially material, though not in itself sufficient to establish the issue. (12 Metcalf, 225.) It is not necessary that the false statements should tend directly to prove the issue in order to sustain the indictment. If circumstantially material, or if it tends to support and give credit to a witness in support of the main fact, it is perjury. (Wood vs. The State, 59 N. Y., 117; Comm. vs. Grant, 116 Mass., 17; State vs. Keenan, 8 Richardson's Rep., (S. C.) 456.) False testimony is deemed material, not only when directly pertinent to the issue tried, but also if it tend to augment or diminish damages, or to impart greater credit to substantial parts of the evidence. The degree of materiality is of no importance. 2 Texas Court of Appeals, Lawrence vs. The State, 479.

The counsel in his argument insists that the indictment failed to allege that the evidence so given on the trial of John Robinson by this plaintiff in error was, as to matter material to the issue, and that therefore the judgment should have been arrested.

The only question then is, does the indictment sufficiently allege the materiality of the matter so sworn to? The grand jury in their presentment charge that on the 20th day of April, 1881, a certain issue was joined in the Circuit Court of Madison county, in an action for aiding a prisoner in custody in an attempt to escape from the custody of an officer; that the State of Florida was the plaintiff in such action, and John Robinson was the defendant; that the issue was tried before the Judge of said Circuit and a jury; that Pleasant Robinson, this plaintiff in error, was there produced as a witness on the part of John Robinson, the defendant; that he was duly sworn in said cause before the Judge of said court, such Judge having authority to administer such oath; "that upon the issue so joined between the parties aforesaid it then and there became and was a material matter respecting which said oath was required whether the said John Robinson on the seventeenth day of January in the year aforesaid, in the county and State aforesaid, had said to one George Smith, he, the said George Smith, being then and there a prisoner, attempting to escape from the custody of one James Ganey, he, the said James Ganey, being then and there a person having the lawful custody of him, the said George Smith, as aforesaid in custody, 'George, you put down your gun and go along with the officer to town, you can't be hurt for that little piece of meat;' and thereupon the said Pleasant Robinson being so sworn as aforesaid, and wickedly contriving and intending to cause and procure a verdict to pass for the said John Robinson," &c., did "wilfully, falsely, knowingly, maliciously and corruptly, and by his own consent upon his oath aforesaid, depose, swear and give in evidence to the jurors so sworn before the Hon. E. J. Vann, Judge, as aforesaid, among other things in substance and to the effect following, that is to say, I was present on the seven-

teenth day of January last at a row between James Ganey and George Smith with John Robinson and others, I heard John Robinson (meaning John Robinson, the said defendant, then and there being tried) say to George Smith, meaning then George Smith, the said prisoner in custody, 'George you put down your gun and go along to town with the officer, you can't be hurt for that little piece of meat,' meaning thereby that he heard the said defendant, John Robinson, then and there persuading him, the said George Smith, to put his gun away and peaceably go with the said officer, the said James Ganey, to the town of Madison for trial, whereas in truth and in fact he, the said John Robinson, did not then and there say to the said George Smith 'George, you put down your gun and go with the officer to town, you can't be hurt for that little piece of meat.' " Also alleging that this plaintiff in error did not hear John Pobinson use such expression, and did not hear him endeavor to persuade George Smith to go peaceably with the officer, &c.

This indictment charges that on the trial of John Robinson for aiding a prisoner in lawful custody to escape from the officer having him in charge, it became a material question whether the said John Robinson used certain language to such prisoner, or whether in effect he advised such prisoner to go peaceably with the officer to his trial. The Plaintiff in Error is charged with having sworn to a certain fact tending to show that John Robinson did advise George Smith to go peaceably with the officer to his trial, when in truth and in fact John Robinson did not use the language so attributed to him, and did not advise the prisoner to go peaceably to his trial.

None of the evidence before the court on the trial is before us, but he is charged in the indictment with testifying that he was present at *"a row"* between James Ganey (the

officer) and George Smith (the prisoner in custody) with John Robinson and others, and the evidence so given by this Plaintiff in Error evidently related to what transpired at that "row." We can see that it may have been, and probably was, directly material to the issue then being tried. The court and jury before whom the Plaintiff in Error was tried believed it to be so, and found him guilty of the crime charged. It is sufficiently charged in the indictment as material to the issue, and the defendant there had notice of what was alleged against him, or, in the words of his counsel's point, "was sufficiently put upon his guard."

After the sentence was pronounced, and after the cause was brought into this court, the counsel assign as error the fact that the court sentenced the prisoner to hard labor, "as there are no such terms in the statute prescribing the punishment for perjury."

The statute (McClellan's Digest, 451,) in regard to the form of sentence, when to be imprisoned in penitentiary, is as follows: "In every case in which the punishment of imprisonment in the State Prison is awarded against any convict the form of sentence shall be that he be imprisoned by confinement at hard labor." * * * The sentence was in the form prescribed by the statute.

Judgment affirmed.

WALTER PARRISH, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. An indictment for perjury should charge that the oath taken by the defendant was wilfully false, and to matter material to the issue. As to the degree of materiality, it is enough if it is circumstantially material, though not by itself sufficient to establish the issue.

2. The form of the sentence of a prisoner convicted of a crime, the punishment for which is imprisonment in the State Prison for any term, should be "that he be imprisoned by confinement at hard labor," unless the court shall otherwise order as provided by low. McClellan's Digest, 451.

Writ of Error to the Circuit Court for Madison county.

The facts of the case are stated in the opinion.

F. W. Pope and *H. J. McCall* for Plaintiff in Error.

The Attorney-General for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an indictment for perjury, tried at the Madison County Circuit Court in October Term, 1881. The indictment was in the exact language of the indictment passed upon in this court in the case of Pleasant Robinson, Plaintiff in Error, vs. The State of Florida, at this term of this court. The case is here on writ of error, brought from the denial of a motion to arrest the judgment. The errors assigned are identical with those in the case of Robinson, and the facts were the same. For the reasons assigned in that case the judgment in this case is affirmed.

VINEY STEVENS, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. All indictments upon statutes must state the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it, and a conclusion "contrary to the form of the statute," &c., will not aid a defect in this respect.
2. Where an indictment, found under a statute, omits a material alle-

gation of that which, by such act, constitutes the gist of the offence, and which makes it punishable by imprisonment, it is bad, and the judgment thereupon will be arrested.

Writ of Error to the Circuit Court for Madison County.

The facts of the case are stated in the opinion.

J. N. Stripling for Plaintiff in Error.

The Attorney-General for The State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

In the month of April, 1881, at the regular term of the Circuit Court held in and for the county of Madison, the grand jury found and presented an indictment against Viney Stevens, the Plaintiff in Error, for an attempt to aid two prisoners to escape from the custody of the sheriff of the said county, she knowing at the time that a felony had been committed by them; and the said Viney Stevens then and there, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to either of such prisoners. A trial was had and the jury found the prisoner guilty. The counsel for Plaintiff in Error moved in arrest of judgment because the indictment is so vague, indistinct and indefinite as to mislead the accused and embarrass her in the preparation of her defence; and, further, that it is so vague that the court cannot render judgment or pass sentence of punishment. The court overruled the motion, and the counsel duly excepted.

The counsel then moved for a new trial, and assigned the following grounds, to-wit:

1. Because the verdict is contrary to law.

2. Because the verdict is not warranted or sustained by the evidence.

This motion was also overruled by the court and the counsel noted an exception. After these two motions had been so overruled, the Judge decided that the indictment was so vague that the defendant might be subjected to a new prosecution for the same offence, and directed the State's Attorney to specify and endorse on the indictment the law upon which the State relied for the conviction of the defendant. In obedience to such direction of the court the State's Attorney made an endorsement on the said indictment as follows:

"To protect Viney Stevens, the accused, from the danger of a second indictment for the alleged offence above stated, it is hereby stated that the law upon which the State relies for conviction is section six, section eight, Chapter 1637, Laws of Florida, on pages 104 and 105, Pamphlet Laws of Florida. J. F. WHITE, State's Attorney."

To this decision of the court and endorsement of the State's Attorney the defendant by her counsel excepted. The defendant's counsel caused a bill of exceptions to be prepared and signed by the Judge, and brings the cause into this court by writ of error.

The errors assigned are as follows:

I. The court below erred in admitting the testimony of M. H. Waring, a witness for the State, relative to matters and things not alleged in the indictment.

II. The court erred in refusing the motion in arrest of judgment.

III. The court erred in refusing motion for new trial.

IV. The court erred in pronouncing sentence and fixing the penalty at two years.

The statute under which this indictment was found, according to the endorsement made by order of the court, by the State's Attorney, upon the same, are sections six and eight of sub-chapter 12 of Chapter 1637, Laws 1868. Sec-

tion six is as follows: "Whoever, not standing in the relation of husband or wife, parent or grand-parent, child or grand-child, brother or sister, by consanguinity or affinity to the offender, after the commission of a felony, harbors, conceals, maintains or assists the principal or accessory before the fact, or gives such offender any other aid, knowing that he has committed a felony, or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment, shall be deemed an accessory after the fact, and be punished by imprisonment in the State Penitentiary not exceeding seven years, or in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars."

The eighth section referred to provides that "whoever attempts to commit an offence prohibited by law, and in such attempt does any act towards the commission of such offence, but fails in the perpetration, or is intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows," &c.

The indictment charges that Charles Savage and Howard James were prisoners in the lawful custody of Charles S. Church, deputy sheriff, for having committed a felony; that Viney Stevens, not standing in the relation of husband or wife, parent or grand-parent, child or grand-child, brother or sister, by consanguinity or affinity, to the prisoners, or either of them, knowing that they had committed a felony, unlawfully, wilfully and feloniously attempted to assist them to escape, with intent that such prisoners should avoid and escape trial and punishment for the commission of such felony; that the said Viney Stevens had divers guns and fire-arms in her hands which she offered to divers evil-disposed persons, with the design and for the purpose of being used by such persons in assisting the escape of

such prisoners, with the intent that they should escape trial and punishment; that she urged, required, incited and commanded such persons to oppose, resist and prevent the sheriff from lawfully detaining in custody the prisoners, with intent that they should escape from custody and thus avoid trial and punishment for the commission of such felony; that said Viney Stevens well knew that such prisoners had committed a felony and were in lawful custody awaiting trial and punishment therefor.

Is this a good indictment under the statute above cited, or should the judgment have been arrested on the motion of the counsel for the defendant? It charges that Viney Stevens attempted to assist the prisoners to escape; that she did not stand in any relationship to either of them within the exceptions mentioned in the statute, and that they were in the lawful custody of the officer for the commission of a felony. It does not allege that she failed in the perpetration of the offence, or was intercepted or prevented in the execution of the same. This is an important averment under this statute, for the reason, if the prisoners did actually escape by her assistance, the indictment should have been found under another section of our statute, and the punishment would have been different. We are not advised from the reading of this indictment whether or not the accused succeeded in her efforts to procure the escape of the prisoners from trial and punishment. Our statute in this respect is in the exact language of that upon the same subject in Massachusetts, and in that State the indictments found under it charge that the accused did fail in the perpetration of the offence, and was intercepted and prevented in the execution of the same. 2 Wharton's Precedents, §1046; Comm. vs. McDonald, 5 Cushing, 365; Comm. vs. Flynn, 3 Cushing, 529; Comm. vs. Harney, 10 Met., 422.

This court has held in a number of cases that offences prescribed and defined by statute must be charged in the same or equivalent language to that used in the statute. McGahagin vs. The State, 17 Fla., 665, and cases cited.

It is a general rule that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it, and a conclusion contrary to the form of the statute, &c., will not aid a defect in this respect. (2 Chitty's Crim. Law, 281.) In the case of The Commonwealth vs. Maxwell, 2 Pick., 142, the court, in citing the language of Chief-Justice DeGrey in Rex vs. Horne, Cowp. 682, says: "The charge must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the court may see such definite crime that they may apply the punishment which the law prescribes." The indictment in this case, framed under the two sections of the statute above cited, omits a material allegation of that which constitutes the gist of the offence, and which makes it punishable by imprisonment in the State Penitentiary. It does not inform the defendant, within the meaning of the law, of what crime she is charged and called upon to answer.

It is not necessary to examine the other questions involved in this case as the judgment must be arrested, but query? is the charge in the indictment that the prisoners, Savage and James, were in custody for having committed a felony sufficient? The statute provides that "any crime punishable by death or imprisonment in the State Penitentiary is a felony, and no other crime shall be so considered." It is not necessary to state that the prisoners were charged

with being guilty of some crime denominated felony, or is it sufficient to allege a conclusion of law? This question has not been raised or argued before this court, and therefore we do not decide it.

The judgment must be arrested and the defendant discharged.

CHARLES H. SAVAGE AND HOWARD E. JAMES, PLAINTIFFS IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. It is necessary that all criminal prosecutions shall be conducted "in the name and by the authority of the State," but it is not essential that an indictment shall recite those or equivalent words. It is enough that the record shows that the prosecution is so "conducted."
2. It is within the discretion of the court to allow a plea of not guilty to be withdrawn for the purpose of pleading in abatement. The general rule is that a plea in abatement must be put in before pleading in bar.
3. A motion to quash a venire for petit jurors should be sustained by direct evidence. An affidavit alleging facts upon information and belief is not sufficient.
4. Where two are jointly indicted and tried for a capital offence each of them is entitled to twenty peremptory challenges on empannelling a jury, but the State can have but five.
5. When the court directs the summoning of persons, by a special venire, "from the county at large," and not from "by-standers," it is discretionary to reject those who have been in attendance upon the court as "by-standers," and as not included in the terms "from the county at large." This distinction is contemplated by the statute.
6. It is not error to allow a party to withdraw a peremptory challenge and then to challenge the same person for cause: *Provided,* The person is present to be examined, or if it be shown that he is disqualified by law from being a juror. If the challenge for cause is not sustained the peremptory challenge must stand.

7. It is not proper to allow a person called as a juror to be questioned as to whether a verdict in favor of one party would affect his social standing in the community, or produce social ostracism against him.

8. A person is not disqualified to be a juror in a capital case because he is opposed to capital punishment, unless to find a verdict of guilty would violate his conscientious convictions on the subject of capital punishment; but the Judge is to determine the question from the evidence on the subject before him.

9. When the record fails to show upon whose motion a person is set aside as a juror, this court will not decide whether certain questions asked of him upon his *voire dire* were proper.

10. In the cross-examination of a witness who had testified to the fact of an encounter between the accused and a person who had been injured, the witness being present, the question whether he had observed marks of violence upon the person of either is a proper cross-examination, though the witness has not testified upon the particular fact embraced in the question. All the facts and circumstances connected with the matters of the direct examination may be inquired into upon the cross-examination.

11. In proving dying declarations only such statements should be received as evidence as relate to what actually transpired, who were the actors, the position of persons, what was said by the parties, what were the instruments used, who used them and how, and like matters, excluding, if possible, everything except what relates to the *res gestae*.

12. Testimony tending to show that during the encounter, which resulted in the death, one of the accused snapped his pistol at a person not engaged in the difficulty is not objectionable. Everything done by the parties at the time may be proved.

13. In charging a jury in a trial for murder the direction that if the accused drew his pistol under circumstances stated and "intentionally shot P., killing him," it is murder in the first degree, is not correct; the instruction should be that if the accused shot P., intending to kill and did kill him, under the circumstances it was murder in the first degree.

14. The charge to the jury on a trial of two persons for murder, one, S., as principal, and the other, J., as principal in the second degree, that if J. was present, aiding and abetting, he was guilty of the same offence, murder in the first degree, is erroneous; it should be shown that the person aiding and abetting, in order to convict

him of murder in the first degree, knew or believed that the principal intended to kill, or that the person aiding and abetting acted upon a premeditated design to take life.

15. Under our statute in relation to homicide, if there is sufficient deliberation to form a design to take life and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder in the first degree. The question of premeditation, like other facts, is for the jury.

16. In cases of conviction of a capital offence, the sentence of the court, under the statute, should be that the prisoner be remanded to a place of safe keeping, &c., (in the usual form,) and that he be hung by the neck until he is dead, at such time and place as the Governor of the State by his warrant shall appoint. The act of 1868 requires the warrant of the Governor to be executed within the walls or enclosure of the jail or prison in the county where the prisoner is confined when the warrant is issued.

Writ of Error to the Circuit Court for Hamilton county.

The Plaintiffs in Error were indicted for the murder of Frank P. Paterson, the former as principal in the first degree and the latter as principal in the second degree. The indictment was found in Madison county, at the Spring term of the Circuit Court for the year 1881. The case was removed on application of the Plaintiffs in Error to Hamilton county, where they were convicted of murder in the first degree at a special term of the Circuit Court held in June.

The second assignment in the overruling of motion of the defendants for leave to withdraw the plea of not guilty and to file a plea in abatement.

The record shows that the plea of "not guilty" was made on the arraignment in Madison county *April 19, 1881*, at the term convened April 11th. The petition was filed at special Hamilton term (*June 13th*), and on the same day the State moved to strike such petition from the files. The petition, which is under oath, is in substance that defendants were poor and could not employ counsel to defend

them until a very few days before the court convened in Madison, and consequently counsel did not have time to inform and prepare themselves for the defence before defendants were required to plead to the indictment; that they plead the day following the presentation of the indictment; defendants are colored men of the African race, and formerly slaves, and were set free by results of the war; the County Commissioners of Madison county, who selected the jury list of 300 for the year 1881, "were white men, who were formerly slave-holders, and were by education and society taught to regard the African race as an inferior race and not entitled to equal rights and privileges with white men;" that there are 800 colored registered voters in Madison county of approved integrity, fair character and sound judgment and intelligence, and in all respects qualified to serve as jurors; that colored voters exceed white voters by 500, still only 38 colored voters were chosen on the list of 300; colored persons should exceed half the 300; that this unjust exclusion of them was on account of their color and former condition of servitude; the grand jury which indicted defendants was drawn from such list, and defendants have been practically denied the equal civil rights and privileges of citizens of the United States, guaranteed to them by the United States and State Constitutions, to prevent discriminations against any citizen on account of race, color or previous condition of servitude. The prayer is for leave to withdraw the plea of not guilty and plead the above allegations in abatement.

The State moved to strike out the petition on the grounds that—

1st. The defendants had waived all matters in abatement by failing to bring them to the attention of the court at an earlier stage.

2d. The right to so withdraw was adjudicated at last term of the court.

3d. The petition is false in every material particular, and unnecessarily encumbers the record.

This motion to strike was supported by an affidavit of Frank W. Pope to the effect that from his personal acquaintance with the County Commissioners who selected the list of 300, dated for a long period of time, and with some for a number of years, he can unequivocally and unhesitatingly deny the allegation made that they failed to include more than 38 colored men on account of their color; that there was at least one colored man on the grand jury. Affiant believes County Commissioners had no disposition or intention to discriminate against defendants, or other colored men, in selecting the 300, but that they acted uprightly and honestly in such matter. Two of the Commissioners were not slave-holders.

The court overruled the motion to strike, and denied the motion of the defendants.

The sixth assignment is that there was error in not granting defendants' motion to quash the regular venire for the petit jury.

The grounds of this motion are—

1st. The venire was not drawn according to law.

2d. The County Commissioners in selecting the list of 300 discriminated against colored men on account of their race, color and previous condition of servitude, and it had been the custom to so discriminate for the past four years.

The motion was supported by affidavit of defendants, to the effect that there are at least 200 colored men in Hamilton county who are persons of approved integrity, fair character and sound judgment and intelligence, and in all respects qualified to serve as jurors; that out of said 200 colored men all have been wilfully excluded, as affiants *are informed and believe,* from the list of 300, except six; that the whole voting population, as affiants are *informed and be-*

here, is about 1,300, and that the discrimination in refusing to place a larger proportion of colored men on said list was on account of their race, color and previous condition of servitude, and it has been the custom in this county for the past four years to thus discriminate; and further, there are about 350 colored registered voters in such county; and this affidavit *is made on reliable information.*

In further support of said motion, defendants read the record of the drawing of the venire. It shows that on May 18, 1881, at 11 o'clock, due notice having been given according to law, and proclamation having been made by the Sheriff, and the County Judge, Clerk and Sheriff being present, the names of eighteen good and lawful men were drawn by the Sheriff, County Judge and Clerk, &c., and a *venire facias* issued by the Clerk.

In opposition to the motion, the State Attorney filed an affidavit denying that any discrimination was made by the Commissioners, or that they were actuated by any motives or feelings of prejudice against defendants, or other persons, on account of race, color or previous condition, but they acted fairly, impartially and without prejudice or discrimination in the matter, and denies that colored persons were excluded from the list on account of race, &c.; and says there are two colored men on the special venire; and denies the four-year allegation, and that as to the venire not being drawn according to law. The State also offered a certificate from the Clerk of the Circuit court, o the effect that the record of the drawing was *erroneous*, and that he drew the venire himself in the presence of the other officers mentioned.

The defendants objected to the filing of the certificate, and the objection was overruled, but afterwards, the defendants having moved to strike out the traverse of the State Attorney on the ground that it was not sufficient or

responsive to defendants' affidavit, the court sustained the motion in so far as the affidavit or traverse is to be considered as evidence in reply to the affidavit of defendants, but refused to strike it from the files, for the reason that it is urged by the State to show that the facts stated by the affidavit of accused are not admitted but denied.

The court refused to quash the venire.

The thirteenth, fifteenth and sixteenth errors assigned are the refusal of the court to permit the counsel for the accused to ask E. C. Jones, Knight, McCullens and Lee, called as jurors, the questions stated in the seventh and ninth subdivisions of the opinion.

Of these three jurors, however, Knight alone was selected and served. How the others were disposed of, whether by peremptory challenge of defendants or State, or how, the record does not disclose.

The court refused to permit the defendants to ask one Lee, who was called as a juror: "Is there such a bias on your mind that you would require evidence to remove it before you could render a verdict contrary to your present opinion?" It was objected to, and the objection sustained, because he had already been asked if he was "sensible of any bias, prejudice or ill-will against the accused," and had answered in the negative, and besides, the question assumed that he had bias when he had disclaimed having any. Lee was not taken on the jury. The record does not disclose why he was not.

The testimony as to dying declarations discussed in the eleventh sub-division of the issue is as follows:

C. T. Coyle testified on behalf of the State as follows: I live in Madison county, Florida, at Greenville. On February 8, 1881, I was at Madisonville, Fla.; reached that place about 11 o'clock A. M. I knew Paterson; saw him on that day in Judge Witherspoon's office, and had a con-

versation with him. He was in a dying condition. I know he was because blood was coming out of his mouth; he was lying on a bed and said he was shot. I asked him if he was hurt, he said he was killed, he was dying. He died in about half an hour I suppose after making this declaration. He was not able to stand up. He could not speak a sentence, the blood choking him; he had to stop to swallow. I asked him who shot him. He told me. His declaration was not reduced to writing. He said Savage shot him twice and James once. He raised his left hand and said James shot him in that, (showing the finger next to the forefinger) and that Savage shot him in the body, putting his hand on the place. Did not notice the size of Paterson's finger. Noticed the wound in the finger. Noticed it as I had his hand in mine that it was a small ball made it. I know Savage and James (points them out). Paterson stated other facts and circumstances concerning the killing that happened at the killing. I asked Paterson if he shot either of the parties, Savage or James, and he said he did not. I asked Mr. Paterson if he had a fight with Savage and James, (counsel for the accused object to giving Paterson's answer, on the ground that it is not a part of the *res gestae*, overruled and excepted to by accused,) he said no, that Savage grabbed him and shot him. The conversation stopped.

Cross-examined:

No one was present but me and Paterson at that time (the dying declarations). I have stated as near as I can recollect every word that was said. He (P.) could not talk continuously. His (P.'s) mind was clear. He only answered the questions when I asked him. Paterson did not say that he made any remark to Savage. Paterson was suffering a very great deal at that time. He said he was suffering terrible pain and agony. Personally I have no feeling against the accused.

Caraway Smith, a witness called for the State, testified as follows: I knew Paterson in his life-time. I know Savage and James. Paterson is now dead. He died 8th February the present year; saw him a short time, about an hour before he died. He was in a dying condition. Saw P. when he was coming out of the court-room after he was wounded, and when he was lying in Judge Witherspoon's room. I conversed with him in meeting him at the court-room door. I asked him if he was hurt, he replied, "yes, my God, I am shot to death." I said no, you are not hurt much. He said, "yes," placing his hands to his breast, "my God, I am shot to death." After he was on the bed in Judge Witherspoon's room he repeated the same words, adding, "I have been robbed of my life." He said Savage and James shot him. Do not remember that he gave their given names. The coat-sleeve of Paterson was on fire when I met him at the court-room door. I examined coat-sleeve and found bullet-hole, at least what I supposed was a bullet-hole. The hole was as large as my thumb, and was burning.

Cross examined:

It was not over two minutes after the shooting when Paterson made the declaration that Savage and James shot him. No one was present but myself. Paterson and I were alone, not longer than the time occupied by the conversation which happened between us. No other one heard the declaration as I remember. The declaration I mean was the one that P. made to me, of which I testified, to-wit: that Savage and James shot him. C. W. Stevens was with P. at the court-room door when I met him. Mr. Stevens was walking at P.'s side, if I remember correctly, and I think he (Stevens) had hold of his arm.

Joel E. Philips, a witness for the State, being sworn testified as follows: I knew Paterson in his life-time. He is

dead. I had a conversation with P. about a half an hour before his death. He was on the bed in the back part of the office. I asked him where he was shot. He placed his hand on the wound, and said he was robbed of his life by Savage and James, and had nothing to defend himself with. I had hold of his hand at the time. He said good-bye, I am dying, and asked me to get him a doctor. Had no further conversation.

The twenty-first error assigned is the court's overruling the objection to the following questions, put to State witness, O. F. Florid, by the State Attorney, and to his answers: "When you went up towards where Savage, Paterson and James were having the difficulty, did James do any other act with his pistol other than you have stated?" He answered "yes." "What was it?" Answer: "James drew his pistol on me, and snapped it at me when I went up." Mr. Florid's testimony shows that the "snapping" at him took place at the time of the other shooting; he says it was between the second and third shots.

The twenty-first error assigned is the court's overruling witness, Brinson, had stated that on the 7th of February, 1881, (the day before the killing) he saw Savage and James get off the train, and that his attention was attracted by their having certain kinds of guns, the like of which was exhibited in court. The State Attorney asked: "Did you ever see any other colored man about Madison with such guns as this?" The accused objected to the question, and it was overruled. "I never did," was the answer. No objection had been taken to the testimony as to seeing the prisoners with the guns, &c.

The twenty-third assignment is that the court erred in sustaining objections of the State to three separate questions asked by the accused of the witness, S. M. Hankins, called in their behalf. The first question was, "whether

or not, on account of their extreme political views and utterances, any prejudice or ill-feeling grew up against the accused among their political opponents?" And the second was, "whether or not, on account of any conduct or action of defendants, *subsequent to the last general election*, any ill feeling grew up among certain of their political opponents, and whether or not threats against them were freely indulged in by such opponents on account of such conduct?" And the third was, "whether or not the defendants, or either of them, preferred charges or were instrumental in procuring indictments in the District Court of the United States, Northern District of Florida, against any person in Madison county for alleged violation of election laws at the last general election, and whether or not, on account of such indictments, any ill feeling was entertained by citizens of Madison county, and particularly by the deceased, Frank P. Paterson, against the defendants, and whether or not threats were made against them by such citizens, and particularly by Paterson?" The first two questions were overruled. As to the other, the court overruled it as a whole, but held that that part of it in regard to the conduct of Paterson to be unobjectionable as a separate question.

The other facts are stated in the opinion.

A. A. Knight, P. W. White and *J. N. Stripling* for Plaintiffs in Error.

The *first error* assigned is that the court erred in not allowing the defendants to withdraw their plea of "not guilty" and file a plea in abatement.

The style of process in this case is in the name of "The State of Florida."

We understand that there is nothing in the indictment which indicates that this prosecution is conducted "in the

name and by the *authority* of the State of Florida." See Wrockledge vs. State, 1 Iowa, 167; Harriman vs. State, 2 G. Green, (Ia.) 270; State vs. Gleason, 12 Fla., 247-8; Ex-parte Nightingale, 12 Fla., 272.

The *second error* assigned is that the court erred in not allowing the defendants at the special term, commencing June 13, to withdraw their plea of "not guilty" and file a plea in abatement.

In the case of Neal vs. Delaware, Supreme Court of the United States, 13th Otto, page 370, the plaintiff in error was, like the defendants, of African descent. He was indicted in the Court of General Sessions of the Peace and jail delivery of New Castle county, Delaware, for rape.

The plaintiff in error, in the petition which he filed for transfer of his cause to the United States Circuit Court, alleged that all colored persons were excluded from serving as jurors on account of their race and color.

It was admitted in this case that colored persons had always been excluded from juries in the courts of Delaware. "6. The exclusion, because of their race and color as citizens of African descent, from the grand jury that found, and from the petit jury that was summoned to try the indictment, if made by the jury commissioners, without authority derived from the Constitution and laws of the State, was a violation of the prisoner's rights, under the Constitution and laws of the United States, which the trial court was bound to redress; and the remedy for and failure in that respect is ultimately in this court upon writ of error."

"7. Upon the showing made by the prisoner, the motion to quash the indictment and the panels of jurors should have been sustained."

It was not claimed in the above case that citizens of African descent were excluded from the grand and petit jury

Under these conditions we think the court would only have exercised a wise and judicial discretion to have allowed the plea of "not guilty" to have been withdrawn, and the plea in abatement filed.

Sixth. The court erred in not granting defendants' motion to quash the venire.

The grounds of said motion were as follows:

2d. Because the County Commissioners in the selection of the list of three hundred names at their regular meeting in January, A. D. 1881, from which the grand and petit jurors to serve at the Circuit Court of said county during the present year were to be drawn, discriminated against colored men on account of their race, color and previous condition of servitude, and because it has been the custom for the past four years to thus discriminate.

We contend that the motion to quash should have been granted upon the same grounds already alleged in support of the petition to file the last mentioned plea in abatement. The same discrimination against colored persons existed in Hamilton county as in Madison, and we refer to the case of Neal vs. Delaware.

Ninth. The court erred in allowing the prosecution ten peremptory challenges, or five peremptory challenges to each prisoner.

Our statute reads as follows: "In capital cases the prisoner shall have twenty peremptory challenges, and the State five." Under this section the court allowed each of the defendants twenty peremptory challenges, total forty, and the State five for each prisoner, total ten challenges. Where there are joint defendants, when the trial is joint, each defendant is entitled to his full number of challenges at common law. Wharton's Criminal Practice and Pleading, 8th Edition, par. 614; 2 Hale, P. C., 268; 1 Chitty, C. L., 535 U. S. vs. Merchant, 4 Mason, 160; 12 Wheaton, 480; State

atory. Therefore, the defendants should have been allowed to withdraw their plea of not guilty, and plead the matters alleged in their petition in abatement. The court says in the case of Neal vs. Delaware, page 394, as follows: "Although for the reasons we have given the prisoner was not entitled to a removal of this prosecution into the Circuit Court of the United States, he is not without remedy if the officers of the State charged with the duty of selecting jurors were guilty of the offence charged in his petition. A denial upon their part, of his right to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in Virginia vs. Rives, *supra*, 'the court will correct the wrong, will quash the indictment, or the panel; or if not, the error will be corrected in a superior court, and ultimately in this court upon review.'

"We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty or property, cannot claim as a matter of right that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, that in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them, because of their color."

These defendants were on trial for their life, they were lately emancipated, were poor and friendless, they had been indicted and almost immediately compelled to plead. After arraignment, owing to the excited and prejudiced condition of the community in which the alleged murder had been committed, a change of venue had been awarded them.

Under these conditions we think the court would only have exercised a wise and judicial discretion to have allowed the plea of "not guilty" to have been withdrawn, and the plea in abatement filed.

Sixth. The court erred in not granting defendants' motion to quash the venire.

The grounds of said motion were as follows:

2d. Because the County Commissioners in the selection of the list of three hundred names at their regular meeting in January, A. D. 1881, from which the grand and petit jurors to serve at the Circuit Court of said county during the present year were to be drawn, discriminated against colored men on account of their race, color and previous condition of servitude, and because it has been the custom for the past four years to thus discriminate.

We contend that the motion to quash should have been granted upon the same grounds already alleged in support of the petition to file the last mentioned plea in abatement. The same discrimination against colored persons existed in Hamilton county as in Madison, and we refer to the case of Neal vs. Delaware.

Ninth. The court erred in allowing the prosecution ten peremptory challenges, or five peremptory challenges to each prisoner.

Our statute reads as follows: "In capital cases the prisoner shall have twenty peremptory challenges, and the State five." Under this section the court allowed each of the defendants twenty peremptory challenges, total forty, and the State five for each prisoner, total ten challenges. Where there are joint defendants, when the trial is joint, each defendant is entitled to his full number of challenges at common law. Wharton's Criminal Practice and Pleading, 8th Edition, par. 614; 2 Hale, P. C., 268; 1 Chitty, C. L., 535 U. S. vs. Merchant, 4 Mason, 160; 12 Wheaton, 480; State

vs. Stoughton, 51 Vermont, 362; State vs. Sutton, 10 Rhode Island, 159; Cruce vs. State, 59 Ga., 83; Bishop's Criminal Pro., Vol. 1, Sec., 1028; Proffatt on Jury Trials, par. 164.

Peremptory challenges were not allowed the prosecution at common law. Wharton's Criminal Practice and Pleading, 8th Edition, par. 612.

(We are aware that some writers differ with Mr. Wharton.) Proffatt on Jury Trials, par. 159.

Persons jointly indicted at common law were not entitled as a matter of right to a severance. Bishop's Criminal Procedure, Vol. 1, 1018; Wharton's Criminal Pleading and Practice, par. 309.

This right was reserved for the prosecution. *Ibid.*

That the court erred in allowing the State five peremptory challenges for each defendant would be evident, even if there were no decision to sustain our assignment of error. At common law the State had no right to peremptory challenges; the defendant also had no right to a severance, but had the right to peremptory challenges, and on joint trial each defendant was entitled to his full number. "Penal statutes are to be strictly construed." And when the statute says that in capital cases the State shall have five peremptory challenges, this is all the State is entitled to even upon a joint trial.

The State could not challenge any peremptorily at common law, but by our statute in capital cases the State can challenge five. If the State desired ten in this case, she had but to exercise her common law right of severance, which was denied to the accused. While the decisions upon this subject are not numerous, yet they are full and satisfactory.

Mr. Proffatt says upon this subject as follows: "But no matter how many are tried on the same indictment, the prosecuting officer is only entitled to his challenges for one.

and cannot claim them for all." Proffatt on Jury Trials, par. 164.

In the case of Frederick Schœffer, Plaintiff in Error, vs. State of Wisconsin, 3d Wisconsin, page 838, the court decides as follows: "Upon the trial of indictment for a capital offence, where there are more than one defendant, each defendant is entitled to challenge twenty-four persons peremptorily.

"One or all may be found guilty, and each one must be regarded as defending himself. Not so in regard to the prosecution. The State is prosecuting for one crime, and though several may be guilty of it, all may be included in the same indictment, and thus make one prosecution, or each may be indicted separately. If, therefore, the prosecuting officer desires to secure to himself six peremptory challenges for each defendant, he should prosecute each separately. But while he cannot control the right of any defendant whom he may choose to join in the indictment, by adopting a joint prosecution against several, he thereby makes the State a party, one and indivisible, upon the one hand, and each of the defendants a party on the other. The right to peremptory challenges is purely a creature of the statute, and it cannot be extended beyond its obvious purview.

"We are, therefore, of the opinion that the court below erred in allowing the prosecuting officer to challenge peremptorily the juror Fairfield, he having already been allowed six such challenges. If the statute should be so construed as to allow the prosecuting officer six challenges for each defendant, he could multiply such challenges indefinitely by simply increasing the number of defendants. Such a construction ought not to be allowed, as it might defeat the very object and intent of the statute."

"The statute of Ohio relating to jurors, which gives to

the prosecuting attorney on the trial of an indictment a right to two peremptory challenges, gives only two in the same indictment, however many defendants may be joined in the same indictment." Mahan vs. State, 10 Ohio, 233.

"When two or more persons are indicted and tried jointly, the State is entitled to no more peremptory challenges than when the trial is against one alone." State vs. Earle, 24 La. Ann., 38.

In this case the prisoners were each allowed to challenge twelve jurors, and the State was allowed six for each accused.

Howe, J., gives the opinion of the court as follows:

"It is true that each defendant was entitled to twelve peremptory challenges, but it by no meane follows that the State is entitled to six for each defendant. The State has no rights in the matter beyond those conferred by the statute, and the statute declares that in all criminal prosecutions, wherein the defendant is allowed peremptory challenges, the State shall also be allowed to challenge without cause any number not exceeding six. (R. S., 1870, §998.) This means clearly six in a *single prosecution—in the trial of a single indictment—without any reference to the number of defendants included in the prosecution, or mentioned in the indictment. The language is plain, the case at bar is within its provisions, and we are therefore constrained to think the court erred in allowing the number of peremptory challenges by the State to exceed six.*" * * *

"We are constrained to order a new trial."

In the case of Wiggins vs. The State, 1 Lea, Tenn., page 738, we find the following: "In the trial of a criminal prosecution in which the peremptory challenges of jurors by the State is limited to four, it is error to allow the State to exceed that number, although two defendants are being tried under the same indictment, when the juror thus chal-

lenged by the State was accepted by the defendants, and defendants afterwards exhausted their challenges before the jury was obtained."

This case is stated as follows on page 739: "In making up the jury for the trial of the defendants, after the State, through the Attorney-General, had challenged four jurors, another juror being presented was challenged by the State and accepted by the accused; but the court, being of opinion that when two defendants were on trial under a joint indictment the State was entitled to double challenges, overruled the motion of the defendants that the juror should take his seat for the trial of the cause, and afterwards, the defendants having exhausted their challenges, the jury were elected."

By the act of 1875, chapter 75, in the trial of criminal prosecutions of this character the State is entitled to four peremptory challenges. Under the act of 1829, chapter 55, which provided that "in the trial of all indictments," &c., "the State and the defendant shall each be entitled to challenge peremptorily five jurors," it was held that where two defendants were arraigned each had the right to the full number of challenges. (Hill vs. State, 2 Yer., 246.) The rule thus established has been followed ever since. But the court refused to extend the rule to civil cases. (Blackburn vs. Hays, 4 Col., 227.) It is argued that the State should have the benefit of the construction. But the reason of the rule is that the right is given to the defendants, and where there are several defendants, although they may be tried together, yet the judgments may be different. Each defendant is on trial, and must stand or fall, ordinarily, as if tried alone. It is only a natural and reasonable construction of the statute to hold that every defendant should have the benefit of its provisions. The State, however, is not multiplied with the defendants, and having elected to

indict and try the parties together cannot claim beyond the fair meaning of the language used. Nor has the construction contended for ever prevailed in practice. The court erred, therefore, in its ruling. 54 Missouri, 153; State of Missouri vs. Auton Holme, pages 156 to 160, inclusive.

We have, we believe, thus cited all the cases reported in the United States upon this subject. In each of the four cases referred to it was held that where two or more persons are indicted and tried jointly the State was entitled to no more peremptory challenges than when the trial is against one alone.

Tenth. The court erred in allowing the State-Attorney to challenge for cause William Hedding, M. B. Bush, E. C. Horn, upon the ground that said jurors were by-standers and could not be summoned under the order of Friday, June 17th, which called for a special venire of one hundred, to be taken from the county at large excluding by-standers.

The said Hedding testified upon his *voir dire* that he had been present at the trial on Monday and Friday, but did not recollect whether he had been present on Wednesday or Thursday. The said Bush testified that he had been present one day, but not Friday, the 17th. The said Horn testified also that he had been present one day, but not on Friday, the 17th.

The word *by-stander* can only apply to those who were present when the order for special venire was issued. There is no evidence that either Hedding, Bush or Horn were present when said order was made, or how long either of them remained in the court-room when present. There is nothing to show that they had gone there for the purpose of listening to the trial, or had heard any of the evidence. Bush and Horn were present but once, and that was not on Friday. Under the order of the court allowing these three

peremptory challenges any and all persons who had ever entered the court-room during the trial could have been similarly challenged for cause.

We are unable to find any precedent which recognizes challenges for cause upon the rulings allowed by said Judge.

Thirteenth. The court erred in not allowing jurors Jones, Knight, McCullens and Lee to answer the interrogatories propounded to them by counsel for accused: "If you should be chosen upon the jury do you not believe that a verdict of acquittal in this case, notwithstanding the evidence might warrant it, would create prejudice against you among your friends and neighbors?" Also in not allowing the following interrogatory, propounded to juror William Knight by counsel for accused: "From what you have heard of the state of the public mind, do you not believe that a verdict of acquittal in this case would create great prejudice against you if you should be chosen on this jury?" Also in not allowing juror John M. McCullens to answer the following interrogatory, propounded to him by counsel for accused: "If you should be chosen on this jury is not the state of the public mind, in your opinion, such in your community that a verdict of acquittal, notwithstanding the evidence may warrant it, would create a prejudice and social ostracism against you among your friends and acquaintances?" Also in not allowing said juror to answer the following question, propounded to him by counsel for accused: "Have you formed any impression unfavorable to the defendants?"

The accused, we claim, were entitled to answers to all of the above interrogatories—they were all presented and directed for the purpose of ascertaining the true "inwardness" of the jurors towards the accused.

These interrogatories in themselves indirectly indicated

incompetency of the jurors. In such cases the burden of establishing such incompetency rests with the party asserting it. The defendants, therefore, should have been allowed to have pressed the line of interrogatories above referred to for the object thus indicated. The People vs. George Brotherston and Louis Brotherston, 47 California, 388; Proffatt on Jury Trials, Par. 176.

"When a person is called as a juror he will be examined on his *voir dire,* and asked 'whether he is twenty-one years of age? Whether he has the requisite property qualifications? Whether he is interested in the results of the suit, or is kin to either of the parties? And whether he is a citizen?' And, indeed, all questions that are pertinent, the answer to which will not tend to degrade the juror or to be to his dishonor or discredit. In prosecutions for felony he may be further interrogated as to whether he has made up and expressed an opinion as to the guilt or innocence of the accused." State vs. Madoil, 12 Fla., p. 152.

"It is the duty of the court, under the laws of this State, to hear any competent evidence in support of a valid objection to the competency of the juror." Barbour vs. State, 13 Fla., 675; Secs. 24 and 5, Chap. 1628, Laws of Fla., Act. of Aug. 6, 1868; Ingersoll vs. Wilson, 2 W. Va., p. 59; Proffatt on Jury Trials, §46.

Fourteenth. The court erred in allowing the State Attorney to challenge for cause Jesse Thomas, the said juror having stated upon his *voir dire* that he was opposed to capital punishment, and was asked by accused, "Do you believe, if you should be chosen upon the jury, you could give a verdict according to the evidence?"

The statute of this State upon this subject is as follows: "No person whose opinions are such as to preclude him from finding any defendant guilty of an offence punishable with death shall be allowed to serve as a juror on the trial of such offence."

The question asked the said Jesse Thomas by the accused was for the very purpose of ascertaining if his opinions were such as to preclude him from being a competent juror.

The fact that he was opposed to capital punishment proves nothing.

In the case of Commonwealth vs. John W. Webster, 5 Cushing, page 295, the court held: "One who is opposed to capital punishment, and fears that his opinion may influence others of the jury, is, notwithstanding, competent to serve as a juror if he believes he can give an unbiased verdict."

Had the juror stated he had conscientious scruples against the death penalty, he would not have been competent. O'Brien vs. People, 48 Barb., 274; 36 New York, 277.

But that a juror is "opposed to capital punishment on principle" does not imply that he had a conscientious opinion which would preclude him from finding a prisoner guilty in a capital case. People vs. Stewart, 7 Col., 140.

We hold, therefore, that the eighth ground of error is well taken.

In regard to the 19th error of Attorney-General's brief, we say we had to obtain this evidence from our own witnesses; had the question been allowed defendants might have possibly omitted all testimony.

In regard to the 20th error of Attorney-General's, we cite 9 Bush, Ky., page 11; Leiber vs. Commonwealth, 12 Bush, Ky., 271, Collins vs. Commonwealth.

The Attorney-General for The State.

The Plaintiffs in Error were indicted for the murder of Frank P. Paterson, the former as principal in the first degree and the other as principal in the second degree. The indictment was found in Madison county, at the Spring term of the Circuit Court for the year 1881. The case was

removed on application of the Plaintiffs in Error to Hamilton county, where they were convicted of murder in the first degree at a special term of the Circuit Court held in June.

The first error assigned is that the court erred in not allowing the accused to withdraw their plea of not guilty and file a plea in abatement on account of errors in the indictment.

The error complained of is the absence from the face of the indictment of the words showing a compliance with the Second Section of Article 6 of the State Constitution. The language of this article is as follows: "The style of all process shall be the 'State of Florida,' and all prosecutions shall be conducted in the name and by the authority of the same."

The indictment commences as follows: "In the name of the State of Florida," and throughout the whole case, at every stage, the State of Florida is stated and docketed, and appears as the prosecutor or plaintiff. The indictment purports on its face to be a presentment of the grand jury, and it concludes "against the peace and dignity of the State of Florida," and is signed by John F. White, State-Attorney of the Third Judicial Circuit of the State of Florida, prosecuting for said State, and is endorsed by the foreman of the grand jury to be a true bill. The defect claimed is the absence from the indictment of the language, or tantamount language, showing that the prosecution is *conducted by the authority of the State of Florida.*

In the case of State of Florida vs. Gleason, 12 Fla., 247, this section came before the court and Mr. Justice Westcott, delivering the opinion of the court, said: "During the dependence of the American Colonies indictments were *conducted* in the name of the King. Our first State Constitutions, after throwing off the Royal Government, provided

that prosecutions should be carried on *'in the name and by the authority of the Commonwealth.'* It should *sufficiently* appear from the record that this is *conducted* by the *authority* of the *State of Florida,* and not by the *authority of any other power. This is what the Constitution means."*

It is stated in the above case that a prosecution in the name and in behalf of the people of the State of Florida is a substantial compliance with such constitutional requirement.

In *ex-parte* Nightingale, 12 Fla., 272, where the power to prosecute was assumed by the Board of Pilot Commissioners of the port of Pensacola, and was expressly in their name, the court say, "to recognize it as constitutional would be tantamount to constituting an *imperium in imperio,* and to vest in such board a power which the people by the Constitution have expressly confided alone to the 'State of Florida;'" and they also say: "This clause * * * was inserted to exclude the idea that any other, either local authority or foreign power, should exercise this authority of prosecuting for crimes under State laws. It was to assert the sovereignty and supremacy of the State in matters of this kind."

There is no inconsistency in the two decisions. They teach, taken together, that all prosecutions should be in the name of the State of Florida, as this is, and that they should, as a matter of fact, be conducted by the authority of the State and not by other authority, and that it is sufficient if it appear from the record that it is so conducted, although, *strictly* speaking, the language of the section should be used.

In Allen vs. Commonwealth, 2 Bibb, 210, the Supreme Court of Kentucky, where a similar constitutional provision obtained, held that an indictment need not express that it is found by authority of the Commonwealth. The

indictment, as here, was in the name of the Commonwealth, and concluded against its peace and dignity, but did not express to be found by the authority of the Commonwealth. "Such an expression," says the court, "is wholly unnecessary."

The Supreme Court of Mississippi, with a similar constitutional provision before it, held that "a formal statement in the indictment that it was found by the authority of the State is not necessary, if it appear from the record that the prosecution was in the name of the State." Greeson vs. State, 5 How., 33; State vs. Johnson, Walker's Reports, 395.

In Wisconsin and South Carolina the same doctrine is held. State vs. Delue, 1 Chand., 166; State vs. Anthony, 1 McCord, 285; 1 Bp. Cr. Pro., §650.

The second assignment is the overruling of motion of the defendants for leave to withdraw the plea of not guilty and to file a plea in abatement.

There is nothing in the petition which would have constituted a good plea in abatement. No damage or wrong is shown to defendants; no actual denial of equal protection of the laws; no charge is made that there was any incompetent, illegal, prejudiced or unfair grand juror, or any person of any such characteristic, on the list of 300; nor that any element of illegality or prejudice, or improper spirit, entered into the action of the grand jury in finding the indictment.

It is, however, to be argued that there is a denial of equal protection of the laws under the 14th Amendment to the United States Constitution. There is in the petition no allegation of such denial. There are, it is true, statements to the effect that out of 800 colored registered voters, of juror qualifications, in a county where colored voters exceed white voters by 500, only 38 colored voters were chosen

on the list of 300, and that the exclusion of colored voters was on account of their color and former condition of servitude, and a charge that the defendants have been denied the equal civil rights and privileges of citizens of the United States, guaranteed to them by the United States and State Constitutions, in not putting more, or at least upwards of 150, colored persons on the list.

If the fact that there was or was not any colored persons on the list was to have any weight in settling the question as to whether colored persons were excluded from the list *on account of color,* the petition is an answer unto itself. It is a potential fact. It shows that the County Commissioners were above so excluding colored persons. The exclusion to be unlawful must be solely on account of color. Had the purpose of the Commissioners been to exclude on this account, then there would have been no colored persons selected. No person is anywhere guaranteed the right to have one or more colored persons on the list, or on his jury; it is merely a right against having colored persons excluded therefrom on account of their color. In the case of Virginia vs. Rives, 10 Otto, 322, the court says: "Nor did the refusal of the court and of the counsel for the prosecution to allow a modification of the venire, by which one-third of the jury, or a portion of it, should be composed of persons of petitioner's own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved * * * was not a right given or secured to them, or to any person, by the law of the State, or by any act of Congress, or by the 14th Amendment to the Constitution. It is a right to which every colored man is entitled, that in the selection of jurors to pass upon his life there should be no exclusion of his race, and no discrimination against them, because of their color; but this is a different

thing from the right which, it is asserted, was denied to the petitioners by the State court, viz: a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia [nor Florida], or by any Federal statute. It is not, therefore, guaranteed by the 14th Amendment."

In view of this language and the doctrine of the opinion from which it is taken, the pretensions of the petition and motion to a right to have more colored persons are untenable. They have no right to have colored persons, but they still have them on the list. They have a right against exclusion solely on account of color, but still they have colored persons on the list. It would be a very impracticable job to fix the exact stated relative number of white and colored persons that should be selected in the existing absence of a statute settling it. What minds would agree as to the numbers? Where is the law to be found prescribing what numbers would answer, or who shall prescribe the numbers? No where. The liberality of being content with the half and a small excess, as may be the case with defendants, might in others be surpassed by a demand that nearly all of the 300 should be colored persons.

Laying out of view everything else but the petition, the weight of its evidence is that colored persons were not excluded from the jury on account of color. It presented at least not only a conclusive case that the jury list was not one from which the race was excluded on account of their color, but a *prima facie* case that no colored man had been excluded from it on account of his color. It is very different from the case of Neal vs. Delaware, 13 Otto, 370, where it appears that no colored person had ever been summoned as a juror in that State. This case will be more fully discussed hereafter.

The court seems to have considered the motion of the State to strike out the petition of defendants with the latter's motion. The State's motion contained a formal denial of the averments of the petition, and was supported by Mr. Pope's affidavit. In view of this issue, and the statements of the affidavit, and the character of the petition as shown above, certainly this court cannot conclude that the charge was true, or that the court below erred.

Admitting there is anything of merit in the proposed plea, it comes too late, and without any sufficient showing for the omission to plead it before pleading not guilty. The court had been in session 8 or 9 days, so counsel must have had twelve or fourteen days before the plea of not guilty, and no reason is shown why in this time, by the use of diligence even less than ordinary, they could not have conceived the sort of an idea here presented, nor discovered any grounds for it. In cases growing out of or surrounded by political excitement such ideas are always quick and *too common.*

The withdrawing of a plea of not guilty and permitting a plea in abatement is within the sound discretion of the court. The general rule is that pleading the plea of "not guilty" alone waives all matters of abatement. Unless there was an evident abuse of such discretion, the refusal of the lower court will not be reversed above. 1 Chitty Cr. L., m. p. 447; 1 Bp. Cr. Pro., §§756, 123—4, 747; 12 Rich., 24; 12 Allen, 4; 2 McCord, 257.

The sixth assignment is that there was error in not granting defendant's motion to quash the regular venire for the petit jury.

Assuming that the objection to be urged under the first ground is that the clerk should have drawn the venire in the presence of the other two officers, and that the drawing is illegal, in that it shows that the three officers drew it, it

is respectfully insisted by the State that the record cannot be taken as asserting that the clerk did not do the actual drawing. In the absence of a showing to the contrary officers are presumed to do their duty, and this record, construed in the light of the law prescribing their duties in the premises, should, even apart from the clerk's certificate, be construed as asserting that the three officers joined in effecting the drawing, and that each one performed his appropriate part. It does not state who actually drew the *names from the box*, and to assume that any one other than the clerk did it is more than the record shows, and contrary to the rule of law above stated as to presumptions where official action is involved. Ammons vs. State, 9 Fla., 538; United States vs. Crussel, 14 Wall., 1; Best on Evidence, 300, cited in 2 Otto, 284; Cowen and Hill's Notes to Phillips on Evidence, note 10, pp. 296--7, and note 13, p. 304; Rudds vs. Johnson, 5 Littell, 19; Lincoln vs. Taunton, 11 Cush., 440; Wallace vs. Maxwell, 1 J. J. Marshall, 447.

The certificate of the clerk shows clearly that the clerk actually drew the names from the box in the presence of the other officers, as required by law. There is nothing in the law requiring a certificate or record to be made of the drawing, and hence it could be proved by parol how it was done. Bank vs. Dandridge, 12 Wheaton, m. p. 69--70, 82, et esq.

There is no proof of the second or "color and previous condition" grounds set up by defendants. The affidavit is on "reliable information," and is traversed and contains not a word of positive assertion; nor are the sources of their "reliable information" stated. It does not even specifically state that the 200 colored men are registered voters. Were there no traverse to the charge, the affidavit would still be insufficient evidence of the charge it makes, for reasons inherent in it besides those urged as to the petition on

the motion to withdraw the plea of not guilty and plead in abatement. It does not state that there are no colored men on the venire, but shows that there are some on the list. Courts should not, and do not at this late day, upset venires and assume violations of law, constitutions and morality, because an affidavit on "reliable information" is made stigmatizing officers.

Where, in this affidavit or record, is to be found the proof that a single man was excluded from the list of 300 solely because of his color, or that any one excluded was qualified to be a juror? To sustain the charge made, (in the face of the showing in this affidavit that the race was not excluded,) the court will require clear and positive proof that there was an exclusion solely on the ground of such previous condition, and that putting the few on was a mere fraud and pretence.

In the case of Virginia vs. Rives, (100 U. S. Reports) Mr. Justice Strong says: "The assertions in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, [which the list in question is not,] and that their race had never been allowed to serve as jurors in the county of Patrick in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their *color or race.* The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected."

There is not even a statement that they cannot get justice from the venire in question, or that they will suffer from the absence of colored persons therefrom.

There was no error in the court's permitting the papers filed by the State to stand as raising an issue on the alle-

gation made by the motion. An issue of law or fact has to be reached in every case before there can be a trial.

The court will observe the marked distinction between this case and that of Neal vs. Delaware in the matter of an issue and the necessity in this case for proof of the allegation of exclusion and discrimination. In that case there was not even a formal denial of the grounds alleged by Neal, nor any objection to the use of the affidavit; but on the contrary an agreement that the verified petition for transfer should be treated as an affidavit in the consideration and decision of the motion, which the United States Supreme Court took as implying a willingness on the part of the State to risk a determination upon the case as made by the affidavit, with any facts of which the court below would take judicial notice, including the fact that no colored citizen had ever been summoned as a juror in the courts of Delaware.

The seventeenth and eighteenth assignments are in substance, the court's permitting the State to challenge peremptorily Henry Mitchell, James Cunningham, Frank Zipperer and Peter Morgan, after it had so challenged five other jurors.

Our statute provides that "in capital cases the prisoner shall have twenty peremptory challenges and the State five."

The prisoners each claimed twenty for himself, the State claimed five against each, and the Judge ruled that they should be so allowed.

In the case of Wiggins vs. State, 1 B. J. Lea, (Tennessee) Reports, cited by the plaintiffs in error, it was held "in the trial of a criminal prosecution, in which the peremptory challenge of jurors by the State is limited to four, it is error to allow the State to exceed that number, although two defendants are being tried under the same indictment.

where the juror thus challenged by the State was *accepted by the defendants,* and the defendants afterwards *exhausted* their challenge *before the jury was obtained.*" The defendants in that case moved that the juror should take his seat for the trial of the cause.

In Mahan, *et als.*, vs. State, 10 Ohio, 232, m. p., cited by plaintiffs in error, the statute provided that every prosecuting attorney and every defendant on the trial of an indictment may challenge peremptorily two of the panel; and if any person prosecuting in behalf of the State shall challenge any petit juror, except as aforesaid, he shall immediately assign the cause of such challenge. The facts are, that each of the three defendants had exercised such right by a peremptory challenge of two; the prosecuting attorney then claimed the right to challenge six, and it was allowed. It was held to be error.

In the case of Schœffler vs. The State, 3 Wisconsin, 823, cited by plaintiffs in error, the statute provided that the prosecuting attorney in capital cases should be allowed "to challenge peremptorily six of the persons returned as jurors, and no more." The prosecuting attorney was allowed six against each defendant, and the court held it to be error. The court say: "We do not know, of course, why the prosecution challenged the juror. It is sufficient to know that he was to all appearance competent, and that he was acceptable to the defendants, and that the challenge of the prosecuting officer was unauthorized by law."

In the case of State vs. Earl & Garvey, 24 La. Ann., 38, cited by the plaintiffs in error, the statute provided that "in all criminal prosecutions, wherein the defendant is allowed challenges, the State shall be allowed to challenge without cause any number not exceeding six." It merely appears that the State was allowed twelve, and it was held error.

There has been no decision by the Supreme Court of Florida, so here it is an open question, both in the abstract and in connection with the particular facts of this case.

By the common law, the prosecution in criminal cases could exercise, on behalf of the crown, peremptory challenges to an unlimited extent without alleging any other reasons than that "they are not good men for the King." Proffatt on Jury Trial, §159; 1 Chitty Cr. Laws, 533.

The statute is one, then, in derogation of the common law right.

The right of using against each defendant the statutory number of challenges can be secured by a severance or by indicting separately. This is not denied by any authority. What, then, is the injury to any prisoner if it should be allowed without a severance? It is not questioned that each defendant, where there is no severance, has for himself the statutory number.

Whatever may be the abstract rule to be adopted by this court, under the circumstances of the case at bar, the ruling of the court below should not be made the basis of a new trial.

The ruling has done the prisoners no harm; they have been tried by an unexceptionable, and, except as to one juror, an unexcepted-to jury. If the case goes back, they can neither claim nor get anything better in the shape of jurors. The law neither guarantees nor conceives anything more for them. What, then, do they complain of—that an improper man has been put on the jury? No. That certain men are not on it? No, for we do not know whether they desired to take or would have taken them, or either of them; but merely because defendants were not given an opportunity, in case the State had no grounds of challenge for cause, to select, or reject them peremptorily if they themselves should not present grounds of challenge for

cause. It does not appear that any man of less merit or fairness than Messrs. Zipperer, Cunningham, Mitchell and Morgan sat on the jury. Is it not, then, a mere abstract question in this case, in so far as any practical effect the ruling has had upon the defendants' rights? Moreover, there is nothing in the record to show that the defendants had either exhausted or made use of their peremptory challenges.

Where justice has been done in a case, why should a new trial be granted on account of such an error? Is not as much accomplished as could be in the absence of such an error?

When a cause has been tried by an impartial jury, although the Judge, on the application of the plaintiff and against the consent of the defendant, may have rejected a juror for a cause, somewhat questionable as to its sufficiency, such rejection is not matter available in error. Tatum vs. Young, 1 Porter, 298.

The court, in the exercise of a sound discretion, has a right to excuse a juror, although he may be found competent to serve; and such an exercise of discretion is no error, although objected to by the parties to the action. John D. C. vs. *ex rel.* Julia V. H., 16 Fla., 555.

It is no ground for the reversal of a judgment of conviction of murder that, in empanelling the petit jury, the court require the State and defendants to challenge peremptorily at the same time, by striking from a list of 36 jurors the objectionable names, instead of conforming to the usual and better practice of allowing the right to be exercised as each juror was called; the record not showing the defendant was prejudiced. State vs. Hays, 23 Mo., 287.

When a verdict of a jury accords with the law and facts of the case, a judgment will not be reversed on account of

an erroneous charge to the jury, or a refusal to give instructions which may be appropriate, especially when a correct charge should produce the same result upon the facts. May's Ex'rs vs. Seymour, 17 Fla., 725; Brown vs. State, 18 Fla.; Prescott vs. Johnson, 8 Fla., 391; Doggett vs. Wiley, 6 Fla., 482; Wilson vs. People, 94 Ill., 299; Leach vs. People, 53 Ill., 318; Calhoun vs. Oneal, 53 Ill., 357.

The matter of excusing jurors, and of when challenges shall be made, and many other matters in the trial of a cause, rest in the sound discretion of the lower court, and its action will not be disturbed unless it is shown that injury has been done to the prisoners. State vs. Hays, 23 Mo., 287; State vs. Marshall, 8 Fla., 91; State vs. Ostrander, 18 Iowa, 435; State vs. Madoil, 12 Fla., 163-4.

If no harm has resulted to the prisoners there can be no more reason why a new trial should be granted on account of error as to a peremptory challenge, than in one for cause or a charge to the jury.

The tenth error assigned is the court's allowing the State Attorney to challenge for cause William Hedding, M. B. Bush and E. C. Horn. The order for the venire was that they should be summoned from the body of the county at large. These men had been, on the day of the order or other days, about the court-house. The Judge permitted them to be challenged on the ground that they were bystanders. It was evidently the purpose of the Judge to prevent any one who might have come to the court-house with the view of getting on the jury from accomplishing such purpose. This was clearly his intention, and it was the exercise of a sound and commendable discretion, and, in permitting the challenge, he was merely enforcing the spirit and purpose of his order, and no harm has resulted to any one from it. John D. C. vs. Julia V. H., 16 Fla., 561-2; State vs. Marshall, 8 Ala., 302; Tatum vs. Young, 1 Porter, 298; State vs. Ostrander, 18 Iowa, 435.

The thirteenth error: The question put to Jones was improper, and so far as the books treat, almost, if not entirely, unheard of. It is not a question as to any prejudice or bias or incompetency of his, but as to consequences which might follow him in case he should find the testimony to make it his duty to acquit. It does not even present the query, whether he would be equal to his duty in the premises. We have been unable to find any law justifying any such question. The same may be said of the first question to McCullens, and of that to Knight. The one to Knight is rendered more untenable by the previous answer he had made. The second question to McCullens was improper, and had been fully and satisfactorily answered.

Of those three jurors, however, Knight alone was selected and served. He shows he was perfectly qualified. How the others were disposed of, whether by peremptory challenge of defendants or State, or how, the record does not disclose. If it was by a peremptory challenge by defendants or by State, I do not see what harm is done. There is nothing in the record to show that defendants *ever* exhausted their peremptory challenges, or could not have got rid of Knight if they desired. The jury was fair and legal and unobjectionable. Knight was the only man on it ever specially objected to. There was no error, and no injury to defendants. Montague vs. State, 17 Fla., 664; 1 Am. Cr. Law, §3031; John D. C. vs. Julia V. H., 16 Fla., 561, et seq.; Tatum vs. Young, 1 Porter, 298; Burt vs. Panjaud, 99 U. S., 180.

The fourteenth error assigned is, permitting the State to challenge for cause Jesse Thomas, who was called as a juror. Thomas stated on his *voir dire* that he was opposed to capital punishment, and was afterwards asked by counsel for defendants: "Notwithstanding your opposition to capital punishment, do you believe, if you should be sworn

upon this jury, you could give a verdict according to the evidence?" The question was objected to, and objection sustained. Whether or not his answer to the question would have been affirmative had it been permitted to be asked, as he had opposition to capital punishment, the act of permitting him to be challenged for cause, which was the result, was certainly in the exercise of a sound discretion. It was certainly best and the most just for all concerned, and no harm could result from ruling even upon the assumption of an affirmative reply. 16 Fla., 561, et seq.; 1 Porter, 298; 99 U. S., 180.

The nineteenth error assigned is the refusal of the court to permit the counsel for the accused to ask the witness Church: "Immediately after the difficulty did you notice any marks of violence about or on the person of Savage? If so, state the locality and character thereof." The refusal was based on the ground that the question was not in cross of anything brought out by the State on this examination. If error it is immaterial, as the facts desired were brought out by the evidence of Eagan and Hankins.

The twentieth error assigned is as follows: Coyle, a witness, in reciting the dying declaration of Paterson, says: "Paterson stated other facts and circumstances concerning the killing that happened at the killing. I asked Paterson if he shot either of the parties, Savage or James, and he said he did not. I asked Mr. Paterson if he had a fight with Savage and James." Here counsel for accused objected to his giving Paterson's answer. "He said no; that Savage grabbed him and shot him. The conversation stopped." Other testimony shows clearly that Paterson was dying, and believed himself to be without hope of recovery. The answer relates to the circumstances of the death or killing, and is admissible. Dixon vs. State, 13 Fla., 638-40; Green vs. State, 13 o., 382.

As to the twenty-third assignment I respectfully submit that prejudice or ill feeling among their political opponents, engendered as indicated by the first question, cannot be invoked to justify or excuse or mitigate the homicide in question; nor can ill feeling among certain political opponents, caused by their conduct as indicated in the second question; nor threats on account of said conduct; nor both. The questions do not, besides, connect the deceased with such threats. For the same reason the third question, considered as a whole, was improper. It was allowed as a question in so far as it applied to the deceased, and no more could be properly claimed.

THE CHIEF-JUSTICE delivered the opinion of the court.

I. The *first* and *third* of the errors assigned which are urged here are that the court erred in overruling defendants' application for leave to withdraw their plea of not guilty and to file a plea in abatement to the jurisdiction and in overruling the plea. The ground of the plea in abatement is that the court is without jurisdiction because what purports to be an indictment is not such as is required by the Constitution, in that it is there required that "all prosecutions shall be conducted in the name and by the authority of the State of Florida," and this indictment does not purport in words to be "by the authority" of the State.

The indictment commences thus: "In the name of the State of Florida; the grand jurors, good and lawful men of Madison county, State of Florida, duly chosen, empanelled and sworn to diligently inquire and true presentment make in and for the body of the county of Madison in the Circuit and State aforesaid * * upon their oaths do present," &c. It is signed "John F. White, State's Attorney

for the Third Judicial Circuit of the State of Florida, prosecuting attorney for said State."

Thus it appears that the indictment is presented by the grand jurors of Madison county, State of Florida, chosen to inquire for the body of said county in the said Circuit and State, and they have presented the defendants and charged them with the crime of murder, in due form. They make the presentment in the name of the State. This Constitution says all prosecutions shall be *conducted* in the name and by the authority of the State. It is not required that the indictment on its face shall say in words that it is "prosecuted in the name and by the authority" of the State. It merely directs that the State in its name and by its authority shall prosecute, and that no other name or any other authority shall control the prosecution. It is sufficient that the court shall recognize the State and its authority, and no other party or authority in such prosecutions, and that the proceedings are so conducted and the record show it. The cases cited by counsel for plaintiffs in error (Harriman vs. The State, 2 G. Green, 270, and Lovel vs. State, 45 Ind., 550-1,) sustain this view. In the case of the State vs. Gleason, 12 Fla., 247, 253, the court did not deem it very material that the information should upon its face express the words of the Constitution, but directed it to be so amended out of caution, the information being deemed the *process* in *quo warranto* proceedings. The indictment in form purports to be a prosecution in the name of the State, and the attorney of the State prosecutes for the State. The court recognized no other authority than that of the State, and this is sufficient. The plea tendered "to the jurisdiction" was therefore properly overruled, and the motion to withdraw the plea of not guilty for the purpose of filing such plea was well refused. In fact the plea proposed was not a plea *to the jurisdiction.*

II. A motion for leave to withdraw the plea of not guilty and to file a plea of abatement of the indictment was made upon petition setting forth that in Madison county, where the indictment was found, the County Commissioners were white men and former slave-holders; that there were in said county eight hundred colored men, registered voters, in all respects qualified to serve as jurors; that the colored voters in said county exceed in number the white voters by five hundred, and yet only thirty-eight colored men were chosen on the list of three hundred persons selected from whom the jurors were to be drawn, and "that *this unjust exclusion* of them from the list of persons from whom the jurors were to be drawn as aforesaid was on account of their color and former condition of servitude, and the grand jury which presented said indictment were drawn from said list," whereby petitioners were practically deprived of rights guaranteed by the Constitution—they being colored men and of the African race and having been slaves.

The petition speaks of "this unjust exclusion" of colored men as being by reason of their color and former condition of servitude; but it does not before appear that there had been any unjust exclusion, nor was a plea in proper form tendered, nor had it been previously tendered before or after the change of venue from Madison to Hamilton county. But the general rule is that a plea in abatement should be put in before pleading in bar. (1 Wharton Cr. Law, 359, n.) By pleading not guilty the accused waives matter in abatement. (McQuillan vs. State, 3 Sm. and Mar., 587; 1 Allen, 4; 1 Bish. Cr. Pro., §§123, 756.) It may have been within the discretion of the court to permit the accused to withdraw the plea of not guilty for the purpose of pleading in abatement, but such discretion should never be reviewed or set aside. In this case the indict-

ment was found in Madison county and the accused were arraigned and pleaded there and then obtained a change of venue. All the witnesses and records to prove the manner of selecting the grand jurors were in that county, and it would have occasioned great delay and expense to try the issue attempted to be set up after the cause had been sent to Hamilton county. It would have been an abuse of discretion to have granted the motion at that stage, especially as the accused had counsel present at the time of pleading in bar. The court therefore did not err in refusing the motion to withdraw the plea and for leave to plead in abatement.

The *fourth* assignment of error seems to have been alleged under a misapprehension of the ruling of the court. The petition was not stricken out.

The *fifth* error assigned relates to the refusal to remove the cause to the court of the United States. This assignment is not insisted upon.

III. The *sixth* error assigned is the refusal of the court to quash the venire of petit jurors.

The motion to quash was made upon two grounds: 1st. "Because the venire was not drawn according to law; and 2d, because the County Commissioners, in the selection of the list of 300 names at their regular meeting in January, 1881, from which the grand and petit jurors to serve at the Circuit Court were drawn, discriminated against colored men on account of their race, color and previous condition of servitude."

The accused filed an affidavit in support of the motion stating on information and belief that there were in the county at least 200 colored men qualified to serve as jurors, and that all of them except six were wilfully excluded from the list by the County Commissioners; that the whole voting population was about 1,300, and that the discrimi-

nation in refusing to place a larger proportion of colored men on the list of 300 was on account of their race, color and previous condition. The State-Attorney filed an affidavit denying specially, on information, the allegations contained in defendants' affidavit; defendants' attorney moved to strike out the latter affidavit, which motion was granted so far as to refuse to consider it as *evidence*, but retained it so far as to make an issue as to the allegations of the affidavit of the accused.

There was no evidence offered in support of the motion except the affidavit of the accused, which was general in its allegations and stated nothing upon their own knowledge. The facts being put issue or not admitted by the State, it became necessary for the accused to prove their allegations. Not having done so there was no evidence on which the motion to quash the venire could be granted.

The seventh and eighth assignments are not insisted upon.

IV. The *ninth, seventeenth* and *eighteenth* errors assigned are that the court allowed the State-Attorney more than five peremptory challenges.

Four persons called as jurors were challenged peremptorily by the State after it had so challenged five, and the challenges were allowed by the court. The statute allows challenges as follows: "In capital cases the prisoner shall have twenty peremptory challenges and the State five."

Where two are jointly indicted and tried for a capital offence each prisoner is allowed twenty peremptory challenges, but the law does not allow more than five to the State as to both. To allow the State to challenge five for each would in effect give the State ten for each prisoner, because each challenge affects each prisoner alike. Counsel for the Plaintiffs in Error cite several authorities to sustain this position: Proffatt on Jury Trials, §164; Schœffler vs.

State, 3 Wis., 823; Mahan vs. State, 10 Ohio, 232; State vs. Earle, 24 La. An., 38; Wiggins vs. State, 1 L. J. Lea, Tenn., 738.

We have found no other cases directly in point. It is unnecessary to consider this question further. It is clear that the court erred in allowing more than five peremptory challenges to the State, and an exception having been taken to the action of the court there was material error affecting the rights of the defendants.

V. The *tenth* and *eleventh* errors assigned are that the court allowed the State-Attorney to ask persons summoned on special venire and called as jurors whether they had been present at the court during the preceding days, and in sustaining a challenge by the State for cause, it having been found that they had been present.

It appears that these persons were summoned by virtue of a special venire, issued under the order of the court, directing the sheriff to summon one hundred good and lawful men from *the county at large* to serve as jurors. The persons referred to were challenged by the State-Attorney for cause, they having been present in attendance at the court and were therefore considered as *by-standers,* and not from the *county at large.* The statute provides for the summoning of jurors "from by-standers or from the county at large." It evidently refers to persons who have been in attendance upon the sessions of the court as by-standers and to those who have not been so in attendance as from the county at large.

Very much must in the nature of things be left to the sound discretion of the Judge who presides at the trial in respect to the excusing of jurors. An arbitrary exercise of this discretion without probable cause could not be sustained, and yet the Judge may have abundant reason to exclude persons from a jury in a given case, where the

juror himself would have no ground to ask to be excused, and there may be no valid ground of challenge. In a case like the present there is frequently much excitement or interest felt in the community, and numbers attend at the term of the court out of curiosity, interest, partizanship or excitement, and the particular case is canvassed with more or less of the elements of sympathy or prejudice, or both, leaving impressions and opinions in the minds of listeners. We can well conclude from the character of the order directing the sheriff to summon jurors from the "county at large" instead of "by-standers" that the purpose in excluding those who had been in attendance at this term, which was being held for the trial of this case, was that the Judge and the State-Attorney desired to have upon the jury only men who had not been influenced or impressed by the surroundings, and to exclude those who are sometimes anxious to get upon juries and frequent the courts for that purpose. In other words, it is evident that the prosecuting attorney and the Judge desired to obtain an unprejudiced jury. There was, in this view, cause apparent to the Judge for excluding from the jury persons who were included in the class that he had directed should not be summoned for valid reasons. We will not here say that there was good ground of *challenge* of the persons referred to, but we cannot say that the act of discharging them was arbitrary and without cause. See J. D. C. vs. J. F. H., 16 Fla., 555, and cases cited.

VI. The *twelfth* error assigned is that the court allowed the State-Attorney to withdraw a peremptory challenge and then to challenge for cause, and to interrogate the person as to cause.

We do not find the precise case in the books. Manifestly, however, the matter is somewhat within the discretion of the court, but it should not be permitted unless the person

challenged is present so that he may be examined as to cause, or unless it is discovered that he is a person disqualified by law from being a juror. But to allow a peremptory challenge of a person not so disqualified to be withdrawn after the person had absented himself would, in effect, increase the number of peremptory challenges, and should not, in such case, be allowed. If the challenge for cause is not sustained the peremptory challenge must stand.

VII. The *thirteenth* error assigned is the refusal of the court to permit the counsel for the accused to ask E. P. Jones, called as a juror: "If you should be chosen upon this jury do you not believe that a verdict of acquittal in this case, notwithstanding the evidence might warrant it, would create prejudice against you among your friends and neighbors?" and his refusal to permit such counsel to ask William Knight, who was called as a juror: "From what you have heard of the state of the public mind do you not believe that a verdict of acquittal in this case would create great prejudice against you if you should be chosen on the jury?" Knight had previously answered that he had not formed or expressed an opinion as to the guilt or innocence of the accused; that he had no bias, prejudice or ill-will against the accused, and that he felt perfectly free to give a fair and impartial verdict upon the evidence; and his refusal to allow such counsel to ask John M. McCully, called as a juror: "If you should be chosen on this jury is not the state of the public mind, in your opinion, such in your community that a verdict of acquittal, notwithstanding the evidence may warrant it, would create a prejudice and social ostracism against you among your friends and acquaintances."

The object to be attained by allowing the examination of persons drawn as jurors is to ascertain their qualifications and whether they would be absolutely impartial in their

judgment. From this examination the court may determine whether they should be allowed or not to sit as jurors, and the parties may determine whether they will challenge *either* from cause or peremptorily. The parties have the right to ascertain the status of the candidate by asking him any pertinent question. We think the questions here propounded were not properly addressed to the person drawn as a juror. He might be inquired of as to whether he was conscious of any circumstances which might influence him in giving a verdict other than upon a fair consideration of the evidence in the case. But there is no known rule authorizing an inquiry the answer to which might tend to degrade him or produce a prejudice against himself, or ostracism against himself and his family. When a juror takes an oath to try a case and render a verdict according to the evidence given in court, he falsifies his oath if he gives a verdict from other considerations. This oath is the protection of suitors in respect to the subject of the inquiry. In a capital case the accused has a large number of challenges to be used at discretion for his protection.

VIII. The *fourteenth* error assigned is that the court erred in not allowing Jesse Thomas, called as a juror, to answer the question proposed to him by defendants' counsel: "Notwithstanding your opposition to capital punishment do you believe if you should be sworn upon this jury you could give a verdict according to the evidence?" Thomas had stated on his *voir dire* that he was "opposed to capital punishment."

The statute in capital cases disqualifies "persons (to be jurors) whose opinions are such as to preclude them from finding any defendant guilty of any offence punishable with death." (Act of 1868, McC.'s Dig., 447, s. 13.) Thomas had not said his opinions were such as to prevent him from conscientiously finding a verdict of guilty; he

had said only that he was opposed to capital punishment. The question was a proper one, tending to find whether his opposition to capital punishment was such as to disqualify him. He was not disqualified solely by reason of his being opposed to capital punishment, unless such opposition was such as to preclude him from finding a verdict of guilty. We do not find, however, that he was excluded by the court for this reason, and we cannot therefore say that an error was committed prejudicial to the accused. (Burt vs. Panjaud, 99 U. S., 180; Metzger vs. State, 18 Fla.) As before remarked, courts have much discretion in determining the qualifications and fitness of persons to be jurors.

IX. *The fifteenth and sixteenth* assignments of error are put upon the ground that the court refused to allow certain questions put by counsel for the accused to McCully and Lee, summoned as jurors. The record does not disclose why these persons were excluded from the jury, or upon whose challenge or for what reason. It is not therefore apparent whether any error was committed by the ruling. Burt vs. Panjaud.

X. The *nineteenth* error assigned is the refusal of the court to permit counsel for the accused to ask the State witness (Church) the question: "Immediately after the difficulty did you notice any marks of violence about or on the person of Savage; if so state the locality and character thereof?"

This ruling of the court was made upon the ground that the question was not in cross-examination of anything brought out by the State, but was competent testimony for defence through their witnesses.

The witness had testified to seeing the deceased and Savage in the room where they met; heard scuffling, saw Savage, on looking round, with his arm around Paterson's neck, his hand fastened in Paterson's coat-collar; went to-

wards them; saw Savage shoot Paterson with a pistol; after that the parties scuffling, Paterson pushing against Savage, trying to get loose; saw Savage fire again, and during the affair both had moved from one part of the room to another, and James finally shooting at Paterson, who fell, and in the course of the affair Savage partly fell, etc. The testimony of the witness Church up to this point covered some ten or more pages of the record.

The objection and the ruling was based upon the fact that the witness had not testified as to seeing marks of violence on the person of Savage, and therefore that it was not in the course of cross-examination to ask the question.

It is a well established rule in the United States that a cross-examination of witnesses is, at the strictest, confined to "facts and circumstances connected with the matters stated in the direct examination." 14 Pet., 461; 1 Greenl. Ev., §445.

There is another familiar rule that when a witness testifies to certain facts relating to a transaction in his presence he should testify to the whole of it. Now this witness testified to seeing Paterson and Savage and James and what they did and their position and condition at the time of the affair. It was certainly in the line of the cross-examination to inquire of this witness if he saw anything else, and what else he saw at the time as to the condition of the parties directly concerned in the mattter of which he had testified. And it was proper cross-examination, not only for the purpose of proving by him any surrounding facts other than those testified to, but for the purpose of testing the correctness of the statements already made, and for these objects the cross-examination is not to be confined to what the witness had already stated. He may be inquired of as to *all* he saw, and *all the facts* and circumstances connected with the matters already stated, which includes as well the

condition of the parties as their acts. Some of their acts and something as to their condition had been stated, and the defendants were entitled by leading questions or otherwise to draw out anything else the witness had observed at the time as to the condition of either of the parties.

The fact that the matter inquired of was afterwards testified to by other witnesses does not affect this question. The defendants were entitled to inquire on cross-examination as to *all* the witness saw after he had testified to part of it.

XI. Upon the *twentieth* error alleged as to the "dying declarations" of Paterson, nothing need be said except that they are always received as evidence, it being first established that the person making them is conscious of approaching death and has no hope of living and the circumstances of the cause of the death are the subjects of the declarations. We examined the legal question in Dixon vs. The State, 13 Florida, 638, and refer to the rule as there stated. We think the testimony before us as to his dying declarations was proper evidence, as showing the condition of the parties, the encounter, the means of death, the persons engaged and who committed the fatal acts, as though the person making the declarations was a witness before the court. The portions of such declarations to the effect that Paterson had nothing to defend himself with, and that he was "robbed of (his) life" are not parts of the *res gestæ*, and should not be called out if it can be avoided. If these expressions are testified to, the court will, of course, instruct the jury, if another trial is had, that they are not evidence. So far as the declarations related to facts occurring at the time of the encounter, the weapons used and the parties using them, what was said and what was done, they are competent, and the court should as far as possible confine the testimony to these matters as constituting the *res gestæ*.

XII. The *twenty-first* error alleged is that the court permitted the witness Florid to answer questions relating to defendant, James, snapping his pistol at the witness. This circumstance occurred at the time of the difficulty and between the shots said to have been fired by the accused at Paterson. The testimony was not objectionable; it showed that James was there, armed with a pistol and endeavored to use it.

The *twenty-second* ground of error assigned, relating to the ruling of the court upon the question by the State Attorney as to whether witness had seen other guns about Madison like those in the hands of the accused, on the day before the killing, is unimporrant, as this testimony does not appear to be material or pertinent to the case.

As to the *twenty-third* alleged error, referring to the exclusion of testimony to the effect that extreme ill-feeling and prejudice existed among political opponents, cannot be sustained for the same reason. The investigation would be endless and boundless.

The *twenty-fourth* and *twenty-fifth* assignments were not insisted upon.

XIII. The *twenty-sixth* and *twenty-seventh* errors assigned are that the court erred in the charge to the jury. After charging at length relative to the law of homicide, the judge concluded with the following propositions:

"2. If you believe from the evidence that Paterson, on passing unarmed, not having arms exposed to view, where Savage was standing, accused Savage of perjury and did nothing more, that Savage using strong language in reply immediately sprang upon Paterson and grasped him to his body, until he, Savage, could draw his pistol from his pocket for the purpose of shooting Paterson, and that he did then and there draw his pistol and intentionally shoot Paterson, killing him, the act was not justifiable on the

ground of self-defence, but is murder in the first degree, and if James was present, aiding and abetting, he was guilty of the same offence as principal in the second degree."

"If you believe from the evidence that Paterson being unarmed on passing Savage unarmed (for the law presumes that they were both unarmed unless they bore them in public view) insulted Savage by using mere words, that Savage retorted by using insulting language, Paterson had no right in law to strike Savage, but if he did with his fist only, Savage had the right to strike back, to repel force by force, and no more, but if he sprang upon Paterson and shot him to death, under the circumstances as stated in the last foregoing proposition, he carried his resistance too far and the act was not justifiable on the ground of lawful self-defence; it may be manslaughter in the second or third degree, according to the means used, and James, if he was present, aiding and abetting Savage, he is guilty of the same offence as principal in the second degree.

"3. If you believe from the evidence that Paterson had a sudden quarrel with Savage and struck him in the face, under the circumstances referred to, a severe blow, such a one as must have inflamed the passions into a heat, that the passions of Savage were actually thrown into a heat, so that thereby the reason of Savage was for the time overthrown, or his mind so clouded that immediately he drew a weapon, a pistol, and fired on Paterson, without a design to effect his death and killed him, the offence is manslaughter in the second or third degree; in the second degree if it was done in a cruel and unusual manner; in the third degree if done by a dangerous weapon; and James, if he was present aiding and abetting Savage, they are both guilty of the same offence."

"4. If you believe from the evidence that this blow,

this provocation, was not a severe but a slight blow with the fist, and that a *dangerous weapon* was used by Savage and Paterson thereby immediately killed, these facts create a strong presumption of malice, a wicked *intention* to do the injury, and rebuts the presumption that it was done *in a heat of passion* and without a *design to effect death.*"

"5. If you believe from the evidence that Paterson, under the circumstances just stated, struck Savage a severe blow calculated ordinarily to inflame his passions into a heat, but that in fact in this case Savage was *not* in a heat of passion, but acted with deliberation on a grudge or from a wicked and depraved heart, and not from the provocation (the blow) it is not manslaughter, but murder in the first degree; and if James was present, aiding and abetting Savage in the act, he is also guilty of murder in the first degree."

"6. If you believe from the evidence that Savage, without any other cause or excuse than insulting words on the part of Paterson to him, grabbed Paterson deliberately and held him until he, Savage, could draw his pistol for the purpose on his (Savage's) part to kill Paterson, and that Savage did then and there, while Paterson was in that position, intentionally shoot Paterson, inflicting the mortal wound as alleged, of which Paterson died as alleged, and that Paterson had no pistol in his hands, nor before Savage grabbed, or did any act that indicated a purpose to draw one, the killing is not justifiable nor excusable, nor manslaughter, but murder in the first degree on the part of Savage, and if you believe from the evidence that Howard E. James was then present aiding and abetting Savage in such killing, by drawing a pistol after the scuffle or encounter commenced, with intent to assist or encourage Savage, then the act of Savage was, in contemplation of law, the act of James, and he is equally guilty with Savage as prin-

cipal in the second degree of murder in the first degree, and you may find them both guilty."

Each of these paragraphs was duly excepted to by the accused.

In the paragraph marked "2" we find language not strictly correct in this: the words "and intentionally shot Paterson, killing him," should under our statute read thus: "And shoot Paterson, *intending to kill and did kill him,*" etc. This is obvious because the law makes the premeditated *intent to kill* necessary to constitute murder in the first degree.

In the paragraph marked "4," instead of the words "*rebuts* the presumption," etc., it should read "*tends to rebut* the presumption," etc.

In each of the paragraphs marked 2, 5 and 6 these words are substantially repeated: "And if James was present aiding and abetting he was guilty of the same offence as principal in the second degree." In each of the paragraphs last named this instruction is erroneous.

In Chitty's Criminal Law, Vol. 1, p. 258, we find this language: "But to constitute a principal in the second degree there must be not only a presence and an aiding and abetting, but a *participation in the felonious design,* or, at least, the offence must be within the compass of the original intention." This is the doctrine of the common law. The charge should be in effect that if James was present aiding and abetting Savage, knowing or believing that Savage intended to kill Paterson, or with a "premeditated design" to kill Paterson, aided and abetted Savage in his act, he was equally guilty with Savage.

The reason is that one who is guilty of murder in the first degree must be charged and proved to the satisfaction of the jury to have done the act charged with a formed design to effect the death, and this is the law as to the princi-

pal in the second degree as well as in the first degree. In other respects the law of the case is well formulated in each of the propositions excepted to.

After the Judge had concluded his charge to the jury counsel for the accused submitted the following in writing and requested that the same be given in charge to the jury:

"In this case the State is required to prove malice, deliberation and premeditation. There should be time and opportunity for deliberate thought, and after the mind conceives the thought of taking life the conception should be meditated upon, and a deliberate determination formed to do the act; but it makes no difference how soon after the fatal resolve is carried into execution."

And at the same time counsel for the accused submitted the following in writing, and requested that the same be given in charge to the jury, to-wit: "In order to justify a verdict of murder in the first degree it is not enough for the State to show that the defendants, or either of them, during the rencounter in which the fatal wound was given, considered whether he or they would flee from the combat. It must be shown beyond a reasonable doubt that prior to the infliction of the mortal wound, a premeditated, formed design existed in the minds of the persons to take the life of the deceased, and that sufficient time elapsed between the conception of the design to take life and the infliction of the mortal wound for them to meditate and deliberate upon the act of killing."

The Judge refused to give the instructions so prayed, the last upon the ground that his principal charge substantially covered the whole ground. Reading the whole charge we find it to have been very laboriously prepared, covering, as we believe, the whole law of this case. With the exception of the particulars indicated we have discovered noth-

ing to criticise in its exposition of the established law of homicide.

In respect to the propositions in the instructions asked for, they had been substantially and correctly given in the body of the charge.

In The People vs. Clark, 7 N. Y., 3 Selden, the court thus lay down the rule: "If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months. *It is enough that the intention precedes the act, although that follows instantly.* The law has no favor to extend, either to the rapid or slow execution of such a design." The statute of New York is substantially in the language of our statute of 1868, except that in that State there was but one degree of murder at the time the case in 3 Seldon was tried. The question of premeditation is one of fact, like other facts, to be determined by the jury.

In Drum's case (8 P. F. Smith, 16.) it is said: "It is true that such is the swiftness of human thought no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose: yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find, the actual intent, that is to say, the fully-formed purpose to kill, with so much time for deliberation and premeditation as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind fully and consciously the intention to kill, and to

select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, then there is time to deliberate and premeditate." This was said in the case of a sudden affray, when the circumstances made it a serious question whether the act was premeditated or was the result of sudden and rash resentment. Jones vs. Com., 75 Pa. St., 403, quotes and endorses the foregoing as a fair exposition of the law under the statutes of that State. The law of Pennsylvania reads: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of *wilful, deliberate and premeditated killing,* * * * shall be deemed murder in the first degree." And so we find that upon the precise point under consideration, the question of *deliberation,* which is a vital element in the crime of murder in the first degree, as defined by the Pennsylvania statute, is construed also in New York, under a statute like ours, that it is enough that the intention precedes the act, without regard to length of time, if there be time enough to form a design to take life and to put that design into execution.

The language of the instructions prayed is not quite sustained by the authorities. It is that "there should be time and opportunity for deliberate thought, and after the mind conceives the thought of taking life the conception should be meditated upon and a deliberate determination formed to do the act." There are here three stages of mental progress necessary to be established by the State according to this proposition: the conception of the thought of taking life, meditation upon the conception and thought, and finally deliberate determination after meditation followed by the execution of the original conception. These mental processes may be metaphysically the correct series necessary for every slayer to experience before being guilty of murder in the first degree; but the law imposes, after all,

its penalties if the conception, the intention formed and the act, however closely following each other, are proved to exist and are imbued with malice. 61 Mo., 555, per Wagner, J.; 64 Mo., 321-2.

The Judge having given charges to the point in the language of approved authorities, it was not error to refuse to repeat them in other forms.

XIV. The sentence directs among other things that the Plaintiffs in Error be hanged by the sheriff of Hamilton county on the day to be named in the Executive warrant and within the walls of the jail of such county.

Our statute is like that obtaining in Massachusetts at the time of the Webster case, excepting that it provided for the execution to take place within the walls of a prison of the county in which *the conviction was had,* or within the enclosed yard of the prison; whereas, under ours, it is to take place within the walls or enclosure of a jail in the county *where such prisoner may be confined.* In that case (5 Cush., 407,) the Supreme Court say: "It is not the duty or the province of the court to fix the time or place" of the execution. The Governor, under our statute, is to fix the time, and his warrant should issue to and direct that it be executed by the sheriff of the county where such prisoner may, at the time of its issue, be confined, within the walls or enclosure of the jail or prison of such county. The sheriff may, in his discretion, execute it within the walls or enclosure. The sentence is erroneous to the extent indicated above.

The point was not suggested in argument, but for the purpose of settling the question we consider it.

For reasons stated, the judgment is reversed, the verdict set aside, and a new trial ordered.

LEWIS WOOD, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. An indictment found under Section 12, sub-Chapter 4, Chapter 1637, Laws 1868, charging that the accused, in the night time, broke and entered, &c., with intent to steal property of the value of six dollars, is bad, in that the breaking and entering was with intent of committing a misdemeanor and not a felony.
2. Such indictment to be good should charge not only that the intent was to commit a felony, but that the breaking and entry was into a "building, ship or vessel." A corn crib is not necessarily either a "building, ship or vessel."

Writ of Error to the Circuit Court for Columbia county.

The facts of the case are stated in the opinion.

B. B. Blackwell for Plaintiff in Error.

The Attorney-General for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The indictment charges that Lewis Wood unlawfully, in the night time of the 29th day of March, 1881, in the county of Columbia, "into the corn crib there situate of James A. Taylor, wilfully, maliciously, forcibly, feloniously and burglariously did break and enter with intent then and there the goods, chattels and valuable property of the said James A. Taylor, in the said corn crib then and there being, then and there feloniously, wilfully and burglariously to steal, take and carry away, and then and there in the said corn crib six bushels of corn, of the value of six dollars, of the goods and chattels of the said James A. Taylor, in said corn crib then and there being found, then and there feloniously and burglariously did steal, take and carry away, contrary to the form of the statute," &c.

On this indictment the defendant was found guilty, and his counsel moved in arrest of judgment, which motion was overruled. The case is here on writ of error.

The errors assigned are as follows:

I. The indictment fails to charge a breaking and entering with intent to commit a larceny that amounts to a felony.

II. The indictment does not charge the breaking and entering a building.

III. The indictment does not charge an offence of which the Circuit Court has jurisdiction.

The statute, Chap. 1637, Laws 1868, sub-Chap. 4, Sec. 12, is the one under which this indictment must have been found, and it reads as follows: "Whoever breaks and enters, in the night time, a building, ship or vessel with the intent to commit the crime of murder, rape, robbery, larceny or other felony, shall be punished," &c. This section clearly implies that the crime which is intended to be committed must be a felony.

A felony by the laws of Florida, sub-chapter 2, Chapter 1637, is a crime punishable by death or imprisonment in the State Penitentiary. Chapter 1693, Laws of 1869, Section one, reads as follows: "That whoever is convicted of stealing property not exceeding in value twenty dollars shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of not more than one hundred dollars, or to be imprisoned in the county jail not more than sixty days, or by both fine and imprisonment, the fine not to exceed one hundred dollars, and the imprisonment not to exceed sixty days, at the discretion of the court." The crime of which the accused was charged was breaking and entering with intent to steal and carry away six bushels of corn of the value of six dollars. This is made a misdemeanor, and cannot be tortured into a felony.

In the case of the People vs. Murray, 8 Cal. R., 519, the court in their opinion say: "It is clear from the fact that all the offences specified in the fifty-eighth section can be nothing but felonies, (except the crime of larceny) and from the further fact that the expression *'or other felony'* is used immediately after *'larceny,'* that the Legislature intended that the intent to commit a *felony* must exist in the mind of the prisoner to make the offence complete. * * * The language of the Legislature is too clear, under the well known rules of construction applicable to criminal statutes, to admit of doubt. It is true that under the construction we are compelled to give the statute, the breaking and entering a dwelling-house with intent to commit petit larceny, may be no statutory offence. But this is an omission which must be provded for by the Legislature."

The indictment is further defective in that it does not charge the breaking and entering a "building, ship or vessel." The breaking and entering is alleged to have been into a "corn-crib," not a building called a corn-crib. We have been unable to find this word "corn-crib" in Worcester's Dictionary, and it is not necessarily a "building, ship or vessel." Corn is defined to be a cereal grain, and the word is commonly used in this country in place of Indian corn or maize. Crib has various definitions, as the manger of a stable, a bin, a frame for a child's bed, a small habitation, and is used in the latter sense by Shakespeare:

> "Why rather, sleep, liest thou in smoky cribs
> Than in the perfumed chambers of the great?"

No where else do we find it used in the sense of a building. The indictment is defective and judgment is arrested.

THOMAS E. SAVAGE, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. Fractions of days are not regarded in law, except when justice requires a careful examination as to the precise time of day at which an act was performed, in order to do right as between parties.
2. Where time is to be computed from a particular day, or when an act is to be performed within a specified period, as from or after a day named, the rule is to exclude the first day designated, and to include the last day of the specified period.
3. An indictment found on the thirteenth day of December, 1880, for an offence alleged to have been committed on the thirteenth day of December, 1878, is good, the offence not being barred by the statute of limitations.
4. It is not necessary that the court should charge the jury in the precise language adopted by the counsel for the defendant in his request, but it is sufficient if it charge the propositions of law so submitted in equivalent language of its own adoption.

Writ of Error to the Circuit Court for Volusia county.

The facts of the case are stated in the opinion.

J. W. Price for Plaintiff in Error.

The Attorney-General for the State.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

Thomas E. Savage, the plaintiff in error, was indicted on the 13th day of December, 1880, in Volusia county for an assault, with intent to murder, in such indictment alleged to have been committed on the 13th day of December, 1878.

The counsel for the defendant moved to quash the indictment upon the ground that it was not found, or the cause prosecuted, within two years after the offence was charged to have been committed, and was therefore barred by the statute of limitations.

The court denied the motion to quash, and the counsel for the defendant then and there excepted to the ruling of the court. The defendant then plead not guilty and was tried, the jury finding him guilty.

Before the court gave its charge to the jury on the trial the counsel for the defendant requested in writing that the following propositions should be embraced in such charge:

First. "If the jury believe from the evidence that the indictment on which the defendant is being tried was not found and presented within two years after the crime is shown by the evidence to have been committed, they must find for the defendant and acquit him."

Second. "If the jury believe from the evidence that the indictment on which the defendant is being tried was found and presented not within two years after the offence therein charged to have been committed, they must find for the defendant and acquit him."

Third. "If the jury believe from the evidence that the defendant was in any other place than that where the crime was committed at the time the same was committed. they must find for the defendant and acquit him."

Fourth. "If the jury had a reasonable doubt arising out of the evidence that the defendant is guilty of the crime with which he was charged, they must give the defendant the benefit of that doubt and acquit him."

The court charged the jury in accordance with the first of such propositions, declined to charge the second, and says the third and fourth "instructions are in the charge to the jury, and no occasion exists for repeating them."

To this ruling of the court the counsel for the defendant excepted.

The counsel for the defendant then moved for a new trial on the following grounds:

"1. Because the verdict of the jury was contrary to the evidence."

"2. Because the court refused to give the specific instructions request by defendant's counsel."

"3. Because of other proceedings apparent on the face of the record."

The motion for a new trial was denied, and the counsel for defendant excepted and brings his case here on a writ of error.

The first and second errors are in substance the same: That the court erred in refusing to quash the indictment upon the ground that the offence therein charged was barred by the statute of limitations.

The offence was charged to have been committed on the thirteenth day of December in the year 1878, and the indictment was presented and filed on the thirteenth day of December, 1880. The statute under which it is claimed this offence is barred is as follows: * * * "All offences not punishable with death shall be prosecuted within two years next after the same shall have been committed." McClellan's Digest, 83, §2.

It is undoubtedly true that when the prosecution of an offence is limited by the statute, the time as alleged in the indictment should appear to be within its limits, as is urged by the counsel for the defendant. In this case the question, then, is when did the statute commence to run? or upon what particular day was a prosecution for the offence barred? There is no bill of exceptions, and none of the evidence is before us, we must therefore assume that the proof of the offence was to the effect that it was committed upon the day charged in the indictment, to-wit: the thirteenth of December, 1878. If the indictment showed upon its face that the offence with which the defendant was charged was barred by the statute of limitation, the motion to quash the indictment upon that ground was a proper proceeding, and should have been granted.

The counsel for the defendant insists that the indictment does not show that the offence was barred under and by virtue of the statute before cited, and contends that the two years within which it should have been prosecuted commenced on the day of its commission, and therefore expired on the day preceding the action of the grand jury by filing the same in open court. We can hardly assent to this proposition. The rule seems to be that in all such cases the first day, or that upon which the offence was committed or the thing done, is to be excluded, and the last day, or the day from which the statute commences to run, is included in the time within which the indictment may be found and the offence prosecuted. This is certainly the rule in all civil cases, and, consequently, must embrace those which are in the nature of criminal prosecutions. Fractions of days are not regarded in law except where justice requires a careful examination as to the precise time of the day at which an act was performed, in order to do right as between parties. The statute requires that the offence shall be prosecuted within two years *next after* it shall have been committed; having been committed on the 13th day of December, 1878, excluding that day, or the fraction of it, the finding and presentment of the grand jury on the 13th day of December, 1880, was within the two years prescribed by statute, and the offence was not then barred.

In the case of Sheets vs. Seldon's Lessee, 2 Wallace R., 177, the court use this language: "The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day, or a particular event, as to when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated and to include the last day of the specified period." In Cornell vs. Moulton, 3 Denio, 12, Chief-Justice Bronson says: "When the

period allowed for doing an act is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time, and so be excluded from the computation." In Ex-parte Dean, 2 Cowen, 605, it was held by the court that when the computation of time in a statute is to be from an act done, the first day should be excluded. (See also 2 Cowen, 518.) In Bigelow vs. Willson, 1 Pickering, 485, the court say, after an examination of the cases bearing upon this point: "We are warranted by the authorities to say that when time is to be computed from or after the day of a given date, the day is to be excluded in the computation." In Wiggins vs. Peters and another, 1 Metcalf, 127, the court of Massachusetts decided that "when an act is to be done in a given term of time, from and after a day named, the day is not included," and says: "The general rule was settled on great consideration, and we think upon satisfactory reasons, in Bigelow vs. Willson," above referred to. The same rule seems to prevail in several other of the States. See The Inhabitants of Windsor vs. The Inhabitants of China, 4 Maine, 298; Rand vs. Rand, 4 N. H., 267; In re Samuel Footner, 2 Harrington, 461; Pyle vs. Maulding, 7 J. J. Marshall, 202; Kinnon vs. Osgood, 19 Missouri, 60; Owen vs. Slatter et al., 26 Ala., 547; Lang vs. Phillips, 27 Ala., 311.

The other two errors assigned relate to the charge of the court to the jury, and were in substance as follows: First. If the jury were satisfied from the evidence that the defendant was not present at the place when and where the crime was committed, they must acquit him. Second. If the jury had a reasonable doubt of the guilt of the defendant, arising from the evidence, they must give him the benefit of the doubt and acquit him. We think both of

these propositions were fairly embraced in the written charge, which, in so far as it relates to these assigned errors, is as follows: "An alibi in evidence signifies that the person charged with the offence was elsewhere when the offence charged was committed. When an alibi is set up it is necessary for the defence to prove it, or to offer such testimony as to satisfy the jury that the person charged with the offence could not be present when it was committed. It is necessary for the State to prove the commission of the offence, and to identify the accused as the person committing the offence. If any reasonable doubt exists on your mind as to the guilt of the accused, you can give him the benefit of such doubt." It is not necessary that the court should charge in the precise language adopted by the counsel for the defendant in his request, but it is sufficient if it charge the matter and propositions of law so submitted in equivalent language of its own adoption. Nickels & Gautier vs. Mooring, 16 Fla., 76.

The judgment is affirmed.

INDEX

TO THE

EIGHTEENTH VOLUME FLORIDA REPORTS

ABATEMENT. See *Criminal Law*, 20; *Parties*, 2.

ACCOUNTS AND ACCOUNTING. See *Lessor and Lessee*, 1; *Master in Chancery*, 1, 2.

ACKNOWLEDGMENT OF DEEDS. See *Deeds*, 1, 2; *Married Women*, 3.

ACTION—

ACCRUAL OF RIGHT OF. See *Lien*, 1, 2, 3.

Where action pending for purpose of order of transfer from one Circuit to another. See *"Transfer of Cause."*

ADMINISTRATORS AND EXECUTORS. See *Evidence and Witnesses*, 1; *Parties*, 2; *Trusts and Trustees*, 1, 2.

1. While an administrator may, under the statutes of this State, maintain an action of ejectment upon the title of the intestate to recover possession, yet not being an owner, joint tenant, tenant in common or coparcener, within the meaning of the statute giving such persons a right to partition, he cannot have partition. *Whitlock* vs. *Willard*, 156.
2. The right of the "wife" (widow) to letters of administration upon the estate of her deceased husband is not absolute, but conditional upon her application. She failing to apply for letters, others, as provided by the statute, may be appointed. Act of November 20, 1828, Section 7, Duval 169, Thompson's Digest, 196. *Rawlins* vs. *Rawlins*, 345.
3. In a proceeding by an administrator to sell real estate to pay debts it is not essential to the jurisdiction of the court that the administrator should, in his petition, allege in terms that it is an intestate estate. The allegation that he is an administrator, the record of the County Court in the matter of the administration,

ADMINISTRATORS AND EXECUTORS—(*Continued.*)
at the same time showing his appointment, and that it was an intestate estate, is sufficient as to this matter. *Deans* vs. *Wilcoxon*, 531.
4. It is not necessary that the petition of the administrator should in terms allege that an estate is solvent or insolvent, as the County Court has jurisdiction to sell lands to pay debts of both solvent and insolvent estates. In the case of a solvent estate the petition alleges an exhaustion of personal assets; and in case of insolvent estates a suggestion of insolvency. In this case the petition alleges that there is no personal estate, and the court finds that the personal property is exhausted. This is sufficient as to this matter. *Id.*
5. An allegation "that the lawful debts and demands existing against the estate amount to the sum of twenty-two thousand six hundred and sixty-five dollars, as appears by the schedule hereto annexed marked A. and *reference therein* made, which he prays *with the reference* may be taken as a part of this, his petition," is a sufficient allegation of the existence of the debt when the reference in the schedule consists of an account sworn to by the parties and admitted by a former administrator to be due. *Id.*
6. That a debt thus proved and admitted was extinguished by *laches* or lapse of time is not a question which the Circuit Court can determine, sitting as a court of law, upon *certiorari*, at the suit of the alleged heir to the County Court, in the matter of a petition by the administrator to sell real estate to pay debts, the creditor being no party, and the fact that the petitioners are heirs not being admitted by the administrator. *Id.*

ADVERSE POSSESSION. See *Ejectment*, 2, 4, 5, 6.

AMENDMENT—
I. OF PLEADINGS.
(1.) Law. See *Pleading*, (*Common Law*,) 8.
(2.) Equity. See *Appeals*, 3.
II. OF PROCEEDINGS AND PROCESS. See *Appeals*, 3.
III. OF STATUTES. *Constitutional Law*, 4.

APPEALS. See *Bill of Exceptions; Costs; Married Women*, 15; *Pleading*, (*Law*,) 8; *Writ of Error; Practice*, (*Law*,) 6.
1. An appeal in an equity cause having been dismissed for want of prosecution or for irregularity, the merits of the cause not having been passed upon, a second appeal may be taken within the time limited by the statute from the entry of the decree. *Harris* vs. *Ferris*, 81.
2. The general rule in cases of this character (appeals in chancery) is to enter the appeal in the name of all the parties against whom

APPEALS—(*Continued.*)

the decree is rendered, and one party may take the appeal in the name of all his co-defendants without first obtaining their consent. If the other parties do not unite in the appeal, or in prosecuting the appeal, those prosecuting may have a summons and severance as to those who will not unite. And when there are more defendants than one all of their names must be in the appeal, unless it be a case where one may appeal, or it will be dismissed. A citation giving notice of the appeal to the co-defendants, requiring them to join in the appeal, returnable to the term to which the appeal is returnable, issued and served as the citation to the respondent is required to be issued and served, will be equivalent to a summons issuing from this court after the appeal is docketed here, and such orders as to severance will be made here as the nature of the case may require. *Whitlock* vs. *Willard,* 156.

3. Where the appeal is irregular for the want of proper parties, they may be made parties here by amendment, and citation may be awarded. In this case, no objection being taken to the irregularity by the respondent, the court in its discretion allows the amendment. *Id.*

4. Refusal to open default for not pleading, subject to review or appeal. *Tidwell* vs. *Witherspoon,* 282.

5. Where, upon a general view of the case, giving the appellant every fair construction of the facts in his favor, an application of the principles of law controlling the matters involved justifies the judgment, it must be affirmed. *Spratt* vs. *Price,* 289.

6. After final judgment in proceedings commenced under the common law practice anterior to the code, an appeal prosecuted after the passage of the code is controlled by the provisions of the code. *Sedgwick* vs. *Dawkins,* 335.

7. The code does not require a bond in an appeal. It requires an undertaking. Such undertaking need not be approved by the Judge or clerk. *Id.*

8. Where the final judgment is a judgment for defendant upon his motion to arrest a judgment upon a verdict of the plaintiff, the error, if there be one, is an error apparent in the record, and no exception, or bill of exceptions, or case is necessary to the review of the action of the court. *Id.*

9. A judgment "that the plaintiff take nothing by his declaration in this cause, and that defendant do have and recover of the plaintiff his costs now taxed at —— dollars and —— cents," is a final disposition of the subject-matter of the litigation, and an appeal lies for such judgment to this court. *Id.*

APPEALS—(*Continued.*)

10. Appeal at law or writ of error is the proper mode of reviewing proceedings of Circuit Court on *certiorari*. *Edgerton* vs. *Mayor Green Cove Springs*, 528; *Deans* vs. *Wilcoxon*, 531.

11. Absence or incompleteness of bill of exceptions is no ground for dismissal of appeal, or for striking case from docket. *Sams* vs. *King*, 552.

12. Where in ejectment a tax deed, not executed so as to convey the land, is given in evidence without objection, and no point is made either in the Circuit Court or on appeal, that the deed is invalid in that respect, yet this court cannot permit such deed to have operation as a conveyance and give it effect by our silence. *Paul* vs. *Fries*, 573.

13. An appeal in chancery opens the whole case to the respondent, and while the appellant may restrict his grounds for a reversal to particular errors alleged, yet the respondent will prevail if upon the whole record the order appealed from is proper. *Fairchild* vs. *Knight*, 770.

APPELLATE PRACTICE. See *Appeals; Bill of Exceptions; Charge of Judge to Jury*, 1, 3; *Costs; Evidence and Witnesses* 9; *Jurors and Jury*, 11; *Married Women* 15; *Master in Chancery* 2; *New Trial* 5; *Next Friend; Pleading* (*Common Law*) 8; *Practice*, (*Equity*) 6; *Writ of Error*.

APPEARANCE. See *Practice* (*Law*) 1, 2, 11.

ARRAIGNMENT. See *Bastardy*, 5.

ARREST OF JUDGMENT. See *Appeals* 8, *Criminal Law*, 5, 7, 17, 18, 25, 26, *Decrees and Judgments* 3, 5.

ASSIGNMENT. See *Contracts* 3, 4, 5.

ASSIGNMENT OF ERRORS. See *Appeals* 8; *Charge of Judge to Jury* 1, 3; *Writ of Error* 6.

ATTACHMENT. See *Bankruptcy* 2; *Notice* 2; *Equity and Equitable Jurisdiction* 6, 7, 8, *Priority*.

ATTEMPTS. See *Criminal Law* 17, 18.

ATTORNEYS AT LAW. See *Practice* (*Law*) 1, 2, 4, 5, 6, 7.

1. In a suit by an attorney to recover compensation for professional services, defendant testifies that plaintiff's services "have been of no value, but had been a great harm to him;" but the whole evidence shows that the services had resulted favorably to his client, and there is no proof that any loss or delay had occurred by reason of plaintiff's management of his client's business, and there is no conflict of testimony as to the value of the services, the defendant's testimony cannot prevail against the proof of such value. *Young vs. Whitney*, 54.

ATTORNEYS AT LAW—(*Continued.*)

2. Where a receiver has moneys sequestered by him under a decree finding such moneys applicable to plaintiff's demand, and a portion of such moneys is applied by order of court to the payment of the claim of plaintiff's attorney against the plaintiff for his services in the suit, a subsequent reversal of the decree and of the order directing payment to the attorney of his claim against platntiff, there being no supersedeas when the money was applied, gives the defendant no claim against the attorney. *Florida Central Company* vs. *Bisbee*, 60.

BANKRUPTCY.

1. A claim against a person for withholding the proceeds arising from the sale of goods consigned to him to be sold on commission, is not a debt contracted by him in a "fiduciary capacity," within the meaning of the bankrupt law of 1867. *Chipley* vs. *Frierson*, 639.
2. Under the Bankruptcy Act of Congress of 1867, an attachment levy is not displaced by the bankrupt proceedings unless the same are commenced within four months after the levy of the attachment. *Carr* vs. *Thomas*, 736.

BAKER COUNTY. See *Counties.*

BASTARDY.

1. In a complaint under the law relating to bastardy, it should be stated, affirmatively on oath, that the mother of the bastard child is a single or unmarried woman. The recital by the magistrate is not sufficient. *E. D. P.* vs. *State ex rel.*, 175.
2. The act relating to bastardy requires a sufficient complaint to b made before a Justice of the Peace, and the Circuit Court can o[illegible] tain jurisdiction only in the manner prescribed by law. *Id.*
3. The remedy in cases of bastardy is a special proceeding provided by law, and the acts relating to amendment of pleadings do not apply to the amendment of a complaint so as to make a case not stated in the complaint before the Justice. *Id.*
4. An affidavit made by the complainant in a case of bastardy, alleging that she is a single woman, has been delivered of a child, which by law is held a bastard, and that the person charged is the father, is sufficient under the statute to authorize the issuing of the process provided thereby. It is not necessary to allege that she was a single woman prior to such delivery; that is a matter for proof upon trial. *W. H. T.* vs. *State ex rel.*, 883.
5. It is not necessary to arraign the defendant on the trial. He answers to the complaint in the Circuit Court, and from thence the proceedings are conducted as in civil actions. Prosecutions under this statute partake partly of a criminal and partly of a civil

BASTARDY—(*Continued.*)
character. In getting into the Circuit Court it partakes in form of the criminal, when there it is a civil action. It was not designed to punish the accused for crime, but to make him contribute to the support of the child. *Id.*

BILL OF EXCEPTIONS. See *Appeals* 8.

1. A bill of exceptions should contain only so much of the testimony as is necessary to decide the questions raised by the exceptions. Where, upon the face of the bill, it appears that a mortgage and a record which was in evidence was omitted, this court will give every benefit to the respondents which could reasonably attend such papers; but if it appears from testimony in the record, (the authenticity of which cannot be doubted,) that there is error, this court will correct it. *Seymour and Simpson* vs. *Creswell*, 29
2. A bill of exceptions containing the evidence as given is the proper method by which the testimony upon a trial is brought to this court. Affidavits of persons present at the trial and of jurors in the case as to what a witness stated, although embraced in a bill of exceptions, cannot be here considered. *Patrick* vs. *Young*, 59
3. That there is no bill of exceptions or an incomplete one in a record is not ground for the dismissal of an appeal or to strike the case from the calendar. There may be errors apparent upon the record other than those arrising from exceptions. *Sams* vs. *King*, 552.
4. Where a bill of exceptions, apparently regular, is signed as required by law, an allegation of counsel unsupported by proof that since the original bill was signed there have been "interpolations" will not authorize the dismissal of the appeal. *Id.*
5. Where papers are referred to in the bill of exceptions filed in the Circuit Court, with sufficient certainty to identify them, the insertion of the papers in extenso in the record prepared for this court is proper. *Id.*
6. Where the books of the Assessor of Taxes are introduced in evidence in the Circuit Court it is not necessary to copy the entire book in the record sent here. It is sufficient to insert such portion of the book as it was introduced to establish, or was deemed pertinent to the questions sought to be raised, or the original may be brought to this court as authorized by the rules of practice. Where neither the part deemed pertinent to the question sought to be raised, nor the books accompanying the record, are sent to this court, the proper course is to award a *certiorari* to bring them up. *Id.*
7. Time having been given during the term at which the case was tried to prepare and tender a bill of exceptions, and the judge presiding at the trial having gone out of office, it is proper

BILL OF EXCEPTIONS—(*Continued.*)
and legal for his successor to settle and sign the bill. (Hays, Adm'r, vs. McNealy, 16 Fla., 406, referred to and approved.) Upon a tender of the bill to such successor, and his refusal to sign it in the presence of three parties who were present at the trial, it is proper for them, under the rules and statute, to sign it if it correctly presents the testimony and proceedings according to their recollection. *Id.*

8. A bill of exceptions, regular in form, properly prepared and attested according to law, imports verity; and its truth cannot be questioned in this court upon appeal by the affidavit of counsel, based upon their own knowledge, or upon the representation of others. *Id.*

BILLS OF EXCHANGE. See *Evidence and Witnesses*, 6, 7, 8; *Lien* 1, 2, 3; *Married Women*, 1, 2; *Taxes and Tax Titles*, 1, 2.

1. Proof of the circumstances under which the plaintiff, the indorsee of a note, purchased it in order to let in evidence of the want of consideration between the original parties, must be such as to necessarily create doubts of the good faith or innocence of the plaintiff in purchasing it. *Livingston* v. *Roberts' Ex'r.*, 70.

2. Reputation that the payee of a note is a "conjurer and fortune-teller," and proof that a probable consideration of the note was medicine and nursing furnished to a sick man by the reputed conjurer and fortune-teller, is not evidence that the note was given in consideration of "conjuring," &c., or that the consideration was illegal. *Id.*

BILL OF DISCOVERY. See *Pleading, (Equity)*, 4.

BILL OF REVIEW. See *Equity and Equitable Jurisdiction* 2; *Husband and Wife*, 2.

BOARDS OF HEALTH. See *Constitutional Law*, 4, 5.

BONDS, COUNTY, TO AID RAILROADS. See *"Counties."*

BOUNDARIES. See *Ejectment*, 10, 11.

BRADFORD COUNTY. See *Counties.*

BURGLARY, WITH INTENT TO COMMIT LARCENY. See *Criminal Law*, 14, 24, 26.

CERTIORARI. See *Administrators and Executors*, 6; *Bill of Exceptions*, 6.

1. A common law writ of *certiorari* to quash proceedings of an inferior jurisdiction does not issue as matter of right, but on cause shown to this court, or to a Justice thereof in vacation; nor is it the duty of the court, even where a case of irregularity in proceedings is shown, properly remediable by this process, to issue it under all circumstances; nor is it the duty of the court to

CERTIORARI—(*Continued.*)
quash the proceeding returned after such writ has issued and the return has been filed in all cases of illegality, irregularity, or even want of jurisdiction. *Basnet* vs. *Jacksonville*, 523.
2. A common law writ of *certiorari* does not serve the purpose of a writ of error or appeal with a bill of exceptions as known to our practice. If the court has jurisdiction, and there is no irregularity or illegality in the procedure, the *certiorari* must be quashed. *Id.*
3. A common law writ of *certiorari* does not serve the purpose of a writ of error or appeal with a bill of exceptions as known to our practice. If the court has jurisdiction and there is no irregularity or illegality in the procedure the *certiorari* must be quashed. *Edgerton* vs. *Mayor Green Cove Springs*, 528.
4. The proper method of reviewing the proceedings of the Circuit Court upon a *certiorari* issued by it is not a *certiorari* but an appeal at law or writ of error, and the general rule is that where an appeal lies a *certiorari* will not be granted. The case of Haliday vs. The Jacksonville Plank Road Company, 6 Fla., 304, referred to and approved. *Id.*
5. This court has jurisdiction upon appeal or writ of error to review the proceedings of the Circuit Court upon a *certiorari* to the County Court. *Deans* vs. *Wilcoxon*, 531.
6. In this State, under the Constitution, a *certiorari* lies from the Circuit Court to the County Court at the suit of the heir to bring up the proceedings of the County Court in the matter of an order of sale of real estate for the payment of the debts of the intestate. The heir, while not required to be made a party to the proceedings for the sale, has such an interest as entitles him to this writ upon proper case made in discretion of the Circuit Court. *Id.*
7. "It is essential to the jurisdiction of the Circuit Court, in a proceeding by *certiorari*, that the writ issue and be returned with a transcript sought to be quashed, unless the writ and return are waived." *Id.*

CHARGE OF JUDGE TO JURY. See *Criminal Law*, 10, 11, 21, 22, 23, 24; *New Trials*, 2.
1. Error cannot be assigned that the Judge gave or neglected to give instructions to the jury as prayed for by counsel, with his ruling thereon, or to sign and seal the same, unless his neglect or refusal was duly excepted to and so appears of record. *Stewart* vs. *Mills*, 57.
2. It is not error for the Judge to refuse to read to the jury the instructions prayed for, which he declines to give to the jury as his

CHARGE OF JUDGE TO JURY—(*Continued.*)
charge or instruction. It is only necessary that he give in writing his refusal to give the instruction as prayed. *Id.*
3. A charge of the court not excepted to cannot be assigned as error. *Wilson* vs. *Marks*, 322.
4. A charge to the jury "that the publication of the truth is not a libel," is not correct; it may be libellous and actionable to publish the truth unless the publication is prompted by "good motives." *Id.*
5. Under the act of 1877 (Chapter 2096), requiring a Circuit Judge to charge the jury only upon the law of the case, it is improper for him to charge that there is no conflicting evidence in the case: but, as in the case at bar, there was, in fact, no conflicting evidence, and the charge did not operate to the prejudice of the accused: *Held*, Not to be a material error affecting the judgment. Chapter 2096 and Chapter 138 distinguished. *Metzger* vs. *State*, 481.
6. The statement in the charge that "in addition to the circumstantial evidence offered in this case, is also what *is said to be* the confession of the accused in relation to his connection with the murder of Samuel Moore," is not a charge that certain facts are proved, nor a violation of Chapter 2096. *Id.*
7. Such statement coupled with the remark that "admissions or confessions are strong evidence against a party," qualified by the observations that "in circumstantial evidence there must be a clear connection with the event or fact charged, and the circumstances connecting the person with the event, and that confessions must have been made without any effort to obtain such from either fear or promises of reward in any manner; in other words, it must be freely made without inducement or threat," are correct propositions, and are not instructions as to what facts are proved, nor as to the conclusions to be drawn therefrom, beyond the application of rules of law to the evidence. *Id.*
8. It is not error to refuse to give instructions asked by a party when the same have already been given in substance by the Judge in his charge to the jury. *Id.*
9. Where instructions containing several propositions are requested it is not error to refuse to give the whole if they contain a single erroneous proposition. *Id.*
10. The refusal of the Judge in charging the jury to instruct them that a majority of them may recommend the prisoner to the mercy of the court under the act of 1872 (Chapter 1877), which recommendation reduces the penalty to imprisonment for life in the State Prison, is not error. Either the counsel or Judge may read

CHARGE OF JUDGE TO JURY—(*Continued.*)
the act to the jury if it is desired, but the Judge is not required by law to give such instruction as a part of the charge. *Id.*
11. When the record shows the propositions of law which counsel ask the court to give in his charge to the jury to be in writing, and an endorsement of the court thereon in writing "refused," with the date and the name of the Judge, no evidence appearing to the contrary, it will be held that the court did conform to the law in declaring "in writing to the jury his ruling thereupon as presented, and pronounce the same to the jury as given or refused." *Jones* vs. *State,* 886.
12. It is not necessary that the court should charge the jury in the precise language adopted by the counsel for the defendant in his request, but it is sufficient if it charge the propositions of law so submitted in equivalent language of its own adoption. *Savage* vs. *State,* 970.
CITIES AND TOWNS. See *Constitutional Law,* 1. 2; *Municipal Corporations.*
CLERK OF CIRCUIT COURT. See *Records,* 1; *Taxes and Tax Titles,* 12, 15, 16.
COLUMBIA COUNTY. See *Counties; Re-establishment of Records.*
COMMERCE, REGULATION OF. See *Constitutional Law,* 6.
COMMISSIONERS OF DEEDS. See *Evidence and Witnesses,* 13, 14.
CONSTITUTIONAL LAW. See *Counties,* 1, 2; *Criminal Law,* 19; *Elective Franchise; Married Women,* 1, 9, 10, 11; *Taxes and Tax Titles,* 11, 15.
1. An act vesting discretion in the owners of one-half of the bonds of a city and twenty of its residents, by which they can dissolve the existing corporation having an elective system of government organized under an act creating a uniform system of municipal government, and re-incorporate the municipality with another and different form of government, under which the principal officers are appointed by the Governor, is unconstitutional. The power and duty of the Legislature under the Constitution is limited to the establishment of a uniform system. *State ex rel. vs. Stark,* 255.
2. Where the legislative intent is that the whole of a statute shall operate to accomplish an evident end and purpose, if that portion of the act providing for the accomplishment of the final purpose is unconstitutional, the dependent and initiatory provisions of the act must fall also. Where an act provides for the dissolution and re-incorporation of a municipality, and it is clear that the dissolution is authorized only as a step looking to and a foundation for the re-incorporation, if that portion which provides for the

CONSTITUTIONAL LAW—(*Continued.*)
re-incorporation is unconstitutional, the whole act must fall. *Id.*
3. Where the language of a Constitution or statute is clear, plain and without ambiguity, effect must be given to it accordingly. *State ex rel. vs. Buckman*, 267.
4. A law which does not in terms assume to revise, alter or amend any prior act or section of an act, but by various transfers of existing duties, the imposition of new duties, and the creation of new officers to perform such duties, has the effect to restrict the operation of antecedent legislation, and thus by implication to modify it, is not unconstitutional. *Lake vs. State ex rel.*, 501.
5. A statute which creates a new class of municipal corporations, leaving nothing to option or discretion as to its operation in creating the new class, and which imposes like duties and bestows like powers upon each municipality of the new class, is a law of uniform operation within the meaning of that term as used in the Constitution of this State. Chapters 1874, 3162 and 3312, Laws of Florida, construed, so far as they affect proceedings upon information in the nature of a *quo warranto*, and the creation of a Board of Health for a new class of municipal organizations. *Id.*
6. Chapter 3159 of the Laws of 1879, being an act to amend section four of an act entitled an act to establish the office of Harbor Master for the Port of Pensacola, approved December 8, 1866, providing that the Harbor Master may demand, for every vessel that may enter the port and load or unload, or make fast to any wharf, certain fees, whether earned by any service rendered to any such vessel or not, is a law imposing a tax upon such vessels or their owners, and a "regulation of commerce" within the terms of the third paragraph of section eight, Article 1, of the Constitution of the United States, which grants to Congress "the power to regulate commerce with foreign nations, and among the several States," and said act is therefore unconstitutional and void. *Webb* vs. *Dunn*, 721.
7. The fifth section of Chapter 1939, Laws of 1873, found in McClellon's Digest, page 219, does not relate to the subject or the object of the act as expressed in its title, or to any matter properly connected therewith, and said section is inoperative and void under Section 14, of Article IV., of the Constitution. *Carr* vs. *Thomas*, 736.
CONTRACTS. See *Lien*, 1, 2, 3; *Married Women*, 1, 2, 4, 5, 6; *Partners and Partnership*, 1.
1. A contract to deliver a certain quantity of timber at so much per foot, to be inspected, and to be delivered "as fast as water will permit, and to be completed not later than June 15, 1880, pay-

CONTRACTS—(*Continued.*)
ment cash on handling specifications," is an entire and not a severable agreement. *Stokes* vs. *Baars*, 656.
2. On delivery of a portion of such timber, duly inspected, the purchaser refuses to pay the full price but deducts $200, being the amount of a draft previously drawn on him by the seller, which the purchaser falsely says he has paid, on the faith of which statement delivery was made, and the $200 remains unpaid. This is not a compliance by the purchaser, and is such a breach of the contract that the seller may refuse further delivery under it. *Id.*
3. After such breach, (the purchaser having assigned the agreement for the benefit of his creditors) the assignor in his own right, or for his assignees, cannot recover damages for subsequent non-delivery to him. *Id.*
4. The assignee of such a contract takes it subject to all defences available against the assignor. *Id.*
5. The purchaser of a certain quantity of timber under a contract to pay for it on delivery, from time to time, by becoming insolvent and making an assignment for the benefit of creditors, is disabled to perform, and thenceforth neither he nor his assignees can claim damages for future non-delivery to the assignees, with whom the seller did not contract. *Id.*
6. A contract entered into by a person so intoxicated as that he is incapable of transacting business intelligently, is voidable by such person. *Mattair* vs. *Card*, 761.

COSTS.
1. The Clerk in taxing costs in a cause to be entered in judgment is required to tax only such items of costs and disbursements as are duly proved by the party demanding the same, or may appear in the records and files of the court, and it is not an error or misprision of the Clerk to omit to tax and enter in judgment items not so demanded and proved. *Hyer's Executors* vs. *Caro's Executrix*, 694.
2. In such case, after judgment entered and the term passed, the judgment cannot be opened and amended by inserting and including other costs to which the party may have been entitled, if they had been demanded and duly proved before judgment. *Id.*
3. Under the Code it was necessary for the party demanding the taxation of costs and disbursements to serve and file an itemized statement thereof. *Id.*
1. When the Legislature divided New River (Bradford) county it was competent to provide that the new county created out of its

COUNTIES—(*Continued.*)
territory (Baker) should assume its *pro rata* share of the indebtedness of the former, to be ascertained by the relative valuation of taxable property in each, at the time of the division. *Canova* vs. *Commissioners of Baker*, 512.
2. The obligation of Baker county to issue its bonds or to pay its debts in the manner provided in the act creating the county passed in 1861, is not affected or controlled by subsequent constitutional or legislative enactment. The obligation of the contract cannot be thus impaired. *Id.*
3. Before Bradford county can proceed to compel Baker county to issue bonds for its *pro rata* share of the bonded indebtedness of the former to Columbia county, (from which Bradford was taken) it must appear that Bradford had issued and delivered its bonds to Columbia county. *Id.*
4. Under the act of 1861 creating Baker county it was made a condition precedent to demanding the issuing of bonds by Baker to Bradford that the *pro rata* of the shares of the capital stock in the Florida, Atlantic & Gulf Railroad Company held by Bradford county should be "set apart" to Baker county. *Id.*
5. The depreciation of the railroad stock in the possession of Columbia or Bradford county since 1861, for the purchase of which the original bonded indebtedness was created, constitutes no valid reason for refusal, on the part of Baker county, to pay its proportion of the indebtedness. *Id.*
6. The fact that Baker county was not a party in mandamus proceedings of Columbia against Bradford county does not affect the liability of Baker county; nor does the judgment in that case preclude Baker county from showing the true amount of her liability to Bradford in any proceeding by Bradford against Baker to compel a contribution of a *pro rata* amount of the indebtedness of Bradford to Columbia. *Id.*

COUNTY CLERK. See *Clerk of Circuit Court.*

COUNTY COMMISSSIONERS. See *County Site.*
Under the law in force in 1861, the Judge of Probate was *ex-officio* chairman of the Board of County Commissioners. The County Judge who succeeds to the Probate office is not now a member of the Board, but the Board as now constituted is the successor of the former Board, and the same duties devolve upon it, except as its duties have been modified by law. *Canova* vs. *Commissioners of Baker*, 512.

COUNTY OFFICERS. See *County Commissioners; County Site.*

COUNTY RECORDS. See *County Site.*

COUNTY SITE.

1. The County Commissioners have no authority to order an election for the location of a county site under Chapter 1890, Laws of 1872, (McClellan's Digest, 321) unless a petition is presented to them signed by one-third of the registered voters of the county, praying for a change of the location of the county site, as required by the first section of the act. *Lanier* vs. *Padgett*, 842.
2. Petitions merely asking that an election be held to locate the county site, or to locate the court-house and county offices, and not asking for a change of location of the county site, do not show that they desire a change: and an election ordered upon such petitions is of no effect to locate or change the county site.
3. Tax-payers may maintain a suit to enjoin the removal of the county offices and county records to any place not legally designated as the county site. *Id.*

CORPORATION. *Constitutional Law* 1, 2, 5; *Criminal Law* 4, 5; *Municipal Corporations; Pensacola.*

COURTS. See *Jurisdiction.*

CREDITOR'S BILL. See *Pleading (Equity.)* 4.

CRIMINAL LAW. See *Bastardy* 5; *Charge of Judge to Jury* 5, 6, 7, 8, 9, 10, 11, 12; *Elective Franchise; Evidence and Witnesses* 4, 15, 16, 17; *Grand Jury*; *Habeas Corpus*; *Jurors and Jury*, 1, 2, 4, 6, 10; *New Trials* 2; *Statute of Limitations* 4, 5, 6; *Writ of Error* 3; see also different specific crimes.

1. A keno table is a gaming table, but the keeper of one cannot be punished under the law of 1839, (Thomp. Digest, 500, 1,) for the reason that the Legislature of 1879, Chapter 3099, has legalized it by requiring a license for such table. *Overby* vs. *State*, 178.
2. The Legislature did not intend to punish criminally any of the acts licensed by its authority, especially when such acts were made the source of a portion of the revenue of the State. *Id.*
3. Persons keeping and running "keno" tables without having procured a license and paid a license tax are guilty of a misdemeanor, and should be punished, on conviction, by a fine, as is provided in Section 12 of Chapter 3099 of the Laws of 1879. *Hazen* vs. *State*, 184.
4. In an indictment against an officer of a corporation for embezzlement for murder by wounding to justify a verdict for murder in fixed by law should appear in such indictment as the owner of the property, and the name of office of such officer as prescribed by law should be truly set forth therein. *Alden* vs. *State*, 187.
5. Judgment will be arrested when it appears that that there is a misnomer in either the name of the corporation or in the title of the officer of the corporation so charged with embezzlement. *Id.*

CRIMINAL LAW—(*Continued.*)

6. Indictments to be valid should be properly endorsed, as is provided by statute, (Thomp. Digest, p. 522,) either "a true bill" or "not a true bill," together with the name of the foreman of the grand jury. *Id.*
7. A judgment on an indictment for obtaining property under or by reason of false pretenses, which indictment does not contain an allegation that the party was induced to part with the ownership of the property by reason of the alleged false pretenses, will be arrested. *Pendry* vs. *State,* 191.
8. An allegation in an indictment charging murder by the infliction of a wound upon the body with a dangerous weapon, of which wound death immediately ensued, the words "mortal wound" not being used, is sufficient to warrant a verdict of manslaughter. *Broun* vs *State,* 472.
9. Whether the words "mortal wound" are necessary in an indictment for murder by wounding to justify a verdict for murder in any of its degrees, the indictment alleging that the deceased died of the wounds, considered. *Id.*
10. It is not strictly correct to charge a jury that "it is for you to say from all the evidence whether or not the prisoner killed the deceased, and whether, if he did so, there was any fact or circumstance in the case to reduce the killing from murder *to self-defence* or to manslaughter," because the jury are by law authorized to inquire further whether from the facts proved the killing was justifiable or excusable, and the law excuses or justifies a homicide in cases other than that of self-defence. *Id.*
11. In defining to a jury the several degrees of homicide and the facts which constitute each as defined by statute, the court should generally also give the exceptions mentioned in the statute, wherein the killing is declared to be justifiable or excusable. *Id.*
12. An indictment for murder, otherwise good in form, charging that the prisoner "feloniously, wilfully and of his malice aforethought, with a premeditated design to effect the death of," &c., is a good indictment under our statute. *Bird* vs. *State,* 493.
13. An indictment for murder which charges the crime according to the common law form is sufficient to sustain a verdict for murder without the use of the words, "from a premeditated design." *Id.*
14. In an indictment for burglarly in the night time, *with intent* to commit larceny of money, goods and chattles, it is not necessary to aver what specific money, goods or chattles were *intended* to be stolen, or the name of the owner thereof. *Jones* vs. *State,* 889.
15. An indictment for perjury should charge that the oath taken by the defendant was wilfully false, and to matter material to the

CRIMINAL LAW—(*Continued.*)
issue. As to the degree of materiality, it is enough if it is circumstantially material, though not by itself sufficient to establish the issue. *Robinson* vs. *State*, 898; *Parrish* vs. *State*, 902.
16. The form of the sentence of a prisoner convicted of a crime, the punishment for which is imprisonment in the State Prison for any term, should be "that he be imprisoned by confinement at hard labor," unless the court shall otherwise order as provided by law. McClellan's Digest, 451. *Id.*
17. All indictments upon statutes must state the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it, and a conclusion "contrary to the form of the statute," &c., will not aid a defect in this respect. *Stevens* vs. *State*, 903.
18. Where an indictment, found under a statute, omits a material allegation of that which, by such act, constitutes the gist of the offence, and which makes it punishable by imprisonment, it is bad, and the judgment thereupon will be arrested. *Id.*
19. It is necessary that all criminal prosecutions shall be conducted "in the name and by the authority of the State," but it is not essential that an indictment shall recite those or equivalent words. It is enough that the record shows that the prosecution is so "conducted." *Savage and James* vs. *State*, 909.
20. It is within the discretion of the court to allow a plea of not guilty to be withdrawn for the purpose of pleading in abatement. The general rule is that a plea in abatement must be put in before pleading in bar. *Id.*
21. In charging a jury in a trial for murder the direction that if the accused drew his pistol under circumstances stated and "intentionally shot P., killing him," it is murder in the first degree, is not correct; the instruction should be that if the accused shot P., intending to kill and did kill him, under the circumstances it was murder in the first degree. *Id.*
22. The charge to the jury on a trial of two persons for murder, one S., as principal, and the other, J., as principal in the second degree, that if J. was present, aiding and abetting, he was guilty of the same offence, murder in the first degree, is erroneous; it should be shown that the person aiding and abetting, in order to convict him of murder in the first degree, knew or believed that the principal intended to kill, or that the person aiding and abetting acted upon a premeditated design to take life. *Id.*
23. Under our statute in relation to homicide, if there is sufficient deliberation to form a design to take life and to put that design into execution by destroying life, there is sufficient deliberation to

CRIMINAL LAW—(*Continued.*)
constitute murder in the first degree. The question of premeditation, like other facts, is for the jury. *Id.*
24. In cases of conviction of a capital offence, the sentence of the court, under the statute, should be that the prisoner be remanded to a place of safe keeping, &c., (in the usual form,) and that he be hung by the neck until he is dead, at such time and place as the Governor of the State by his warrant shall appoint. The act of 1868 requires the warrant of the Governor to be executed within the walls or enclosure of the jail or prison in the county where the prisoner is confined when the warrant is issued. *Id.*
25. An indictment found under Section 12, sub-Chapter 4, Chapter 1637, Laws 1868, charging that the accused, in the night time, broke and entered, &c., with intent to steal property of the value of six dollars, is bad, in that the breaking and entering was with intent of committing a misdemeanor and not a felony. *Wood* vs. *State*, 967.
26. Such indictment to be good should charge not only that the intent was to commit a felony, but that the breaking and entry was into a "building, ship or vessel." A corn crib is not necessarily either a "building, ship or vessel. *Id.*

CROSS BILL. See *Married Women*, 6, 7.

DAMAGES. See *Jurors and Jury*, 3; *Lien*, 3; *New Trial*, 6.
Under a declaration for libel, damages being generally and not specially alleged, evidence of special damage is not admissible. *Wilson* vs. *Marks*, 322.

DECLARATION. See *Damages*, *Pleading*, (*Common Law.*) 4, 8, 9, 10, 11, 12; *Practice*, (*Law*), 11; *Ejectment*, 12.

DECREES AND JUDGMENTS. See *Appeals*, 4, 5, 6, 9; *Attorneys at Law*, 2; *Costs*; *Equity and Equitable Jurisdiction*, 2, 7, 8; *Homestead*, 11; *Husband and Wife*, 1, 2; *Judicial Sales*; *Master in Chancery*, 1, 2; *Mortgage*, 2, 3, 4, 5; *Practice*, (*Law.*) 3, 4, 5, 6; (*Equity,*) 1, 2, 3.
1. What is done under a decree is valid so far as third persons are concerned, notwithstanding the subsequent reversal of the decree. Where moneys collected under such decrees are applied by order of court to a debt of plaintiff to a third person, there is no remedy against such third person upon a subsequent reversal of the decree. *Florida Central Company* vs. *Bisbee*, 60.
2. A decree in a suit to which a person was not a party does not bind him. *Marvin* vs. *Hampton*, 131.
3. Motions in arrest of judgment arise from *intrinsic* causes appearing upon the face of the record, and must be founded upon such matter as would, upon demurrer, have been sufficient to overthrow the action or plea. *Sedgwick* vs. *Dawkins*, 335.

EQUITY AND EQUITABLE JURISDICTION—(*Continued.*)

trial, and to set aside an execution upon such judgment, or to set aside an execution illegal or void, and to enjoin a levy upon personal property, there being ample remedies at law. *Wordehoff* vs. *Evers & Bird*, 339.

3. A suit in equity cannot be maintained under the law of 1881 against a sheriff to enjoin him from taking proceedings to appraise and set apart personal property levied upon which is wrongfully claimed by a debtor to be exempt from forced sale, unless the sheriff actually does, or threatens to do, some act upon such wrongful claim tending to the injury of the creditor. *Cathcart* vs. *Turner*, 837.

4. That the matters developed in the trial are matters cognizable in equity and not at law, is a good ground to set aside the findings of a referee. *Price* vs. *Drew*, 670

5. When a remedy in equity exists, and a remedy at law is created, the equity jurisdiction is not destroyed unless by express terms of the law. *Thrasher* vs. *Doig & Geiger*, 809.

6. Where a writ of attachment is levied upon goods, and afterwards an execution is levied upon the same goods, and the sheriff, before judgment in the attachment suit, advertises the goods for sale under the execution, a court of equity has no jurisdiction to enjoin the sale under the execution at the instance of the attaching creditor, the court at law having ample power to control the process and its officer; and the sheriff acts at his peril in selling the property under a junior levy. *McKeown* vs. *Coogler*, 866.

7. After dismissing a bill filed by an attaching creditor to restrain a sale under a subsequent levy by execution, it is improper to decree that the property under levy in the hands of the sheriff be delivered to the debtor. The sheriff is entitled to it by virtue of his levies. *Id.*

8. Nor should the decree in such case dismiss the attachment, as such dismissal, if proper, should be made in the attachment suit. *Id.*

ESTOPPEL.

Where a general agent having a power to sell a piece of land, limited only in the method of payment, and the agent having control of the rents of a building on the land, upon a sale of the land at public sale announces, in the presence of a tenant, that the purchaser, after a named date, shall be entitled to the rents, and the special agent, upon a payment for a part of the time to the purchaser, expresses approval of it, the principal is estopped from claiming rent paid to such purchaser by such tenant. *Knox* vs. *Barnett*, 594.

DEEDS—(*Continued.*)
the deed is an ancient deed, the rule is to any extent modified? But however this may be, *the fact of the execution of the deed* may be shown independent of the power, and if the deed be otherwise admissible as bearing upon a question of boundary, and the act of the parties in making the deed is pertinent to the issue, upon proof of execution it should go to the jury. *Id.*

DEFAULTS. *Practice,* (*Law*) 3, 4, 5, 6.

DEMURRER. See *Ejectment,* 12; *Pleading,* (*Common Law*) 4, 5, 7, 9, 10, 11, 12; (*Equity*), 3; *Practice,* (*Law*), 9, 10; (*Equity*), 4, 5.

DISMISSAL OF SUIT. See *Appeals,* 1, 11; *Decrees and Judgment,* 4; *Married Women,* 15; *Practice,* (*Common Law*) 10; *Process,* 1.

DIVORCE. See *Husband and Wife,* 1, 2.

DOWER. See *Evidence and Witnesses,* 1; *Statute of Limitations,* 1, 2.

1. The wife having joined in the execution of a mortgage deed with her husband, an acknowledgment by her made in the manner prescribed by statute, that she made herself a party to and executed the foregoing deed of mortgage "for the purpose of conveying and mortgaging all of my estate *in esse* and *in futuro* in the lands therein described," is sufficient to bar her dower interest. *Hart* vs. *Sanderson's Administrators,* 103.

2. The statute authorizing the private examination of the wife to bar dower is a substitute for the proceeding at common law to bar dower by fine and recovery. As against a mortgage of the fee of the husband, which mortgage was accompanied by a relinguishment of the dower of the wife, an acknowledgment thus made cannot be impeached by her testimony alone. Such an acknowledgment may be impeached for fraud, but the proof to sustain such charge must be of the clearest, strongest and most convincing character. *Id.*

DYING DECLARATIONS. See *Evidence and Witnesses,* 16.

EJECTMENT. See *Administrators and Executors,* 1; *Evidence and Witnesses,* 1.

1. In actions of ejectment, special pleas of the statute of limitations should not be allowed and such pleas should be struck out by the court without motion. *Weiskoph* vs. *Dibble,* 24.

2. Adverse possession may be shown under the plea of not guilty. *Id.*

3. Where the initial point of a survey is the bank of a river at a named point, a plaintiff in ejectment, claiming that the land has extended into the water beyond the original initial point named in his deed, thus changing his boundary by leaving out lands lying beyond the lines extended from the initial point, must

EJECTMENT—(*Continued.*)
prove the fact of encroachment of the land upon the water *Seymour & Simpson* vs. *Creswell*, 29.

4. To constitute an adverse possession as against the true owner, where a party under a mistake as to the boundaries of his deed claims land not embraced therein, there must be an actual possession and improvement of the land which lies outside of his boundaries. This under the statute anterior to the act of 1872. *Id.*
5. As against the true owner, a plaintiff in ejectment, claiming title founded upon a written instrument and a judgment or decree of a court, to be deemed in adverse possession, must, under the statute of 1872, (Chapter 1869, Laws,) have usually cultivated or improved it, or have protected it by a substantial enclosure, or, if not enclosed, have used it for the supply of fuel, or of fencing timber for the purposes of husbandry, or for the ordinary use of the occupant. *Id.*
6. The general rule in actions of ejectment that the claimant must recover upon the strength of his own title, does not operate to prohibit the acquisition of possessory rights which may be enforced in ejectment between parties in cases where the true owner does not intervene; but a prior possession to be effective as against a mere squatter or intruder in actual possession, must be an actual, unabandoned possession. The payment of taxes, surveying and mapping the lands, and executing a mortgage covering them, do not constitute such possession. *Id.*
7. Where the "property in question" in an action of ejectment, as shown by the declaration, is a named lot in a city, a verdict that "we the jury find the defendant guilty of improperly withholding the property in question and find for plaintiff damages to amount of four hundred and thirty dollars," is sufficiently certain. *Patrick* vs. *Young*, 50.
8. The general rule in ejectment is that any title acquired subsequent to issue joined must be set up by a plea *puis darrein* continuance Where, however, no injustice is done, a tax deed in the hands of the original purchaser may have relation to the day upon which the party was entitled to it, and if such day precedes the date upon which issue was joined it is admissible under the general issue. *Spratt* vs. *Price*, 289.
9. In ejectment, defendant in possession may defend by showing legal title in another person and out of plaintiff who is claiming possession as a right incident to legal title. *Hogans* vs. *Carruth*, 587.
10. That a deed does not upon its face show that it embraces the lot in question, or that the plaintiff does not show this fact as a foundation for its introduction, is not a good objection to its in-

EJECTMENT—(*Continued.*)
troduction in evidence. A party is not required to locate on the ground the calls of a deed before it is admitted. *Id.*
11. Where the calls of a deed first give boundaries by land owned by neighboring proprietors or adjoining tracts, and afterwards by courses, distances and area, and there is an apparent conflict, deeds, showing the ownership of the adjoining tracts at the time of the execution of the first deed are proper evidence, and they, with other facts tending to prove the intention of the parties, are proper evidence. *Id.*
12. Lands are described in a declaration in ejectment thus: "Lots one and two *of* range thirty-one, east, township nineteen, south, and fractional section thirty," and on demurrer that the description was so vague that the lots could not be identified; it is held that the language imports that lots one and two are *parts of* the range, township and section named, and the description is sufficiently intelligible and definite. *Wade* vs. *Doyle*, 630.
13. Where in ejectment a tax deed not executed so as to convey the land is given in evidence without objection, and no point is made either in the Circuit Court or on appeal that the deed is invalid in that respect, yet this court cannot permit such deed to have operation as a conveyance and give it effect by our silence. *Paul* vs. *Fries*, 573.
14. If the plaintiff has not a legal title at the time of commencement of his suit in ejectment, he cannot recover. An equitable interest ripening into a legal title, after suit brought, cannot have relation to the former equitable interest so as to give a right of possession at the inception of the suit. And so a tax deed executed on the day of trial cannot be given effect in favor of the plaintiff, although he might have held the certificate of sale and might have had a deed before suit. The rule is otherwise as to a defendant who sets up such title to defeat the plaintiff's claim of possession. See *Spratt* vs. *Price*, 18 *Fla.*, 289.

ELECTIVE FRANCHISE.
A conviction of petty larceny disqualifies a person from voting in this State. *State ex rel.* vs. *Buckman*, 267.

EQUITABLE PLEAS, (AT LAW.) See *Pleading*, (*Common Law*,) 1, 2.

EQUITY AND EQUITABLE JURISDICTION. See *County Site*, 3; *Injunction*, 4; *Judicial Sales*, 3, 4.
1. A court of equity has no jurisdiction to enjoin proceedings on a mandamus, where the parties seeking redress by such proceedings are not the plaintiffs in equity. *Finegan* vs. *Fernandina*, 127.
2. A court of equity cannot entertain a bill to review and reverse a judgment of a Justice of the Peace for errors committed on the

EQUITY AND EQUITABLE JURISDICTION—(*Continued.*)
trial, and to set aside an execution upon such judgment, or to set aside an execution illegal or void, and to enjoin a levy upon personal property, there being ample remedies at law. *Wordehoff* vs. *Evers & Bird*, 339.

3. A suit in equity cannot be maintained under the law of 1881 against a sheriff to enjoin him from taking proceedings to appraise and set apart personal property levied upon which is wrongfully claimed by a debtor to be exempt from forced sale, unless the sheriff actually does, or threatens to do, some act upon such wrongful claim tending to the injury of the creditor. *Cathcart* vs. *Turner*, 837.

4. That the matters developed in the trial are matters cognizable in equity and not at law, is a good ground to set aside the findings of a referee. *Price* vs. *Drew*, 670

5. When a remedy in equity exists, and a remedy at law is created, the equity jurisdiction is not destroyed unless by express terms of the law. *Thrasher* vs. *Doig & Geiger*, 809.

6. Where a writ of attachment is levied upon goods, and afterwards an execution is levied upon the same goods, and the sheriff, before judgment in the attachment suit, advertises the goods for sale under the execution, a court of equity has no jurisdiction to enjoin the sale under the execution at the instance of the attaching creditor, the court at law having ample power to control the process and its officer; and the sheriff acts at his peril in selling the property under a junior levy. *McKeown* vs. *Coogler*, 866.

7. After dismissing a bill filed by an attaching creditor to restrain a sale under a subsequent levy by execution, it is improper to decree that the property under levy in the hands of the sheriff be delivered to the debtor. The sheriff is entitled to it by virtue of his levies. *Id.*

8. Nor should the decree in such case dismiss the attachment, as such dismissal, if proper, should be made in the attachment suit. *Id.*

ESTOPPEL.
Where a general agent having a power to sell a piece of land, limited only in the method of payment, and the agent having control of the rents of a building on the land, upon a sale of the land at public sale announces, in the presence of a tenant, that the purchaser, after a named date, shall be entitled to the rents, and the special agent, upon a payment for a part of the time to the purchaser, expresses approval of it, the principal is estopped from claiming rent paid to such purchaser by such tenant. *Knox* vs. *Barnett*, 594.

EVIDENCE AND WITNESSES. See *Attorneys at Law*, 1; *Bills of Exceptions*, 1, 2; *Bills of Exchange*, 1, 2; *Damages; Deeds*, 1, 2, 3, 4; *Ejectment*, 2, 3, 10, 11; *Dower*, 2; *Libel; Master in Chancery*, 1; *Pleading*, (*Equity*,) 2; *Practice*, (*Equity*,) 1, 9; *Statutes and Statutory Construction; Taxes and Tax Titles*, 11, 12, 20, 23; *Writ of Error*, 5.

1. In an action of ejectment by a widow seeking to recover dower assigned to her, the letters of administration are not evidence in her individual suit against a stranger to prove the death of the husband. *Weiskoph* vs. *Dibble*, 24.
2. When a party in cross-examining a witness presses questions relating to collateral matters not testified to in the direct examination, he makes the witness his own as to the facts so brought out. *Livingston* vs. *Robert's Executor*, 70.
3. Testimony of impressions and conclusions, drawn from a conversation, is of little value against positive testimony giving the language used. *Id.*
4. Whether the circumstances attending a confession, or a conversation in which the accused has made statements showing his knowledge of the time and manner of the killing, the *weapon used*, and the motive influencing him and evidencing his guilt, are such as entitle the same to be received in evidence as the deliberate and voluntary statement of the accused, is a question for the court to decide. The usual practice is to ascertain these circumstances before the admission or statements are permitted to go to the jury; but if such inquiry is not made in advance it may be made afterwards, and if it appear that the confession or statement was not voluntary, or was induced by improper influences, the testimony should be excluded from the consideration of the jury. Where the circumstances are developed by the witness in his detail of the confession or conversation, or from such inquiry, and the confessions or statements appear to have been made volvoluntarily, and not to have been induced by improper influences, they should not be withdrawn or withheld from the jury. *Metzger* vs. *State*, 481.
5. It is proper and necessary to the intelligent consideration by this court of the testimony of expert witnesses, and of such portion of the testimony as refers to plats, maps and diagrams, that such maps and diagrams as introduced should accompany the record. *Hogans* vs. *Carruth*, 587.
6. The rule is well settled that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument. *Robinson* vs. *Barnett*, 602.
7. It is oftentimes allowable to show contemporaneous facts and circumstances attending the negotiation of parties in making con-

EVIDENCE AND WITNESSES—(*Continued.*)

tracts, as such facts and circumstances may throw light on the disputed contract itself. *Id.*

8. B. sued R. as payee and endorser upon a promissory note. At the maturity of the note the cashier of B. called upon R. for payment. R. declined to pay it, alleging that his signature as endorser was a forgery, but to save the costs of a protest he wrote over such alleged forged signature the words "protest waived:" *Held,* That on the trial R. could give in evidence the facts, and the conversation had by him with cashier B. at the time those words were written, as contemporaneous facts and circumstances, to rebut the presumption that by writing those words he intended to adopt the signature as his own. *Id.*

9. No objection can be urged in the Appellate Court to the evidence given in the court below, except as to its sufficiency, unless objection was there made when it was received. *Tuton* vs. *Gazan,* 751.

10. Certified copies of record and papers lawfully left in the office of the Secretary of State are, by statute, made competent evidence, as the originals would be. *Id.*

11. When testimony is received without objection it is considered as received by consent. *Id.*

12. The statute laws of other States must be proved before the courts of this State like other evidence. *Id*

13. The acknowledgement of deeds and other writings before a Commissioner appointed by the Governor to take acknowledgments, &c., in other States within the United States, are not required to be certified by him under an official seal, his private seal only being required by the statute. *Id.*

14. Where the officer taking an acknowledgement of a deed styles himself such in his certificate, that is *prima facie* evidence of the fact that he is such officer. *Id.*

15. In the cross-examination of a witness who had testified to the fact of an encounter between the accused and a person who had been injured, the witness being present, the question whether he had observed marks of violence upon the person of either is a proper cross-examination, though the witness has nottestified upon the particular fact embraced in the question. All the facts and circumstances connected with the matters of the direct examination may be inquired into upon the cross-examination. *Savage and James* vs. *State,* 909.

16. In proving dying declarations only such statements should be received as evidence as relate to what actually transpired, who were the actors, the position of persons, what was said by the

EVIDENCE AND WITNESSES—(*Continued.*)
parties, what were the instruments used, who used them and how, and like matters, excluding, if possible, everything except what relates to the *res gestae*. *Id.*
17. Testimony tending to show that during the encounter, which resulted in the death, one of the accused snapped his pistol at a person not engaged in the difficulty is not objectionable. Everything done by the parties at the time may be proved. *Id.*
EXCEPTIONS. See *Appeals* 8; *Bill of Exceptions; Charge of Judge to Jury*, 1, 3; *Evidence and Witnesses*, 9, 11.
EXECUTIONS. See *Equity and Equitable Jurisdiction*, 2, 3, 7; *Homesteads and Exemptions*, 1.
At a sale on execution the purchaser takes only the interest of the defendant in execution. *Massey* vs. *Hubbard*, 688.
EXECUTION SALES. See *Executors*.
EXPERTS. See *Evidence and Witnesses*, 5.
FALSE PRETENSES, OBTAINING MONEY UNDER. See *Criminal Law*, 7.
FORECLOSURE OF MORTGAGE. See *Judicial Sales; Mortgages*, 3, 4, 5.
FRAUD. See *Principal and Surety*, 2.
Fraud is not to be imputed to an honest creditor who is preferred by a failing debtor as against another creditor who had been promised payment by the debtor out of the proceeds of the same property assigned to the former to secure him. *McKeown* vs. *Coogler*, 866.
FRAUDULENT CONVEYANCES. See *Fraud; Principal and Surety*, 2.
GAMING. See *Criminal Law*, 1, 2, 3.
GRAND JURY. See *Jury and Jurors*, 4; *Criminal Law*, 6, 20; *Indictment*.
HABEAS CORPUS.
1. While it is within the jurisdiction of this court, under the statute, (Chapter 3129, Laws,) to award a *habeas corpus* and have a preliminary examination of a party arrested after affidavit and warrant, and discharge, commit to bail or remand into custody, still, the general rule is that this court should, under such circumstances, remand the party to the custody of the sheriff to be delivered to the magistrate issuing the warrant. *Exparte Eagan*, 194.
2. While in such case an affidavit of the party that he has reason to believe, and does believe, that he cannot get a fair examination or secure justice before such magistrate, coupled with the fact that two persons, charged with the murder with the aiding and

HABEAS CORPUS—(*Continued.*)

abetting of which the prisoner is charged, and deemed by him to be essential witnesses, are confined in the jail of the county in which this court is sitting, are not deemed sufficient grounds upon which this court would have such examination; still, if the ground of the alleged belief be on account of alleged prejudice against the party, and the Attorney-General for the State consents to such examination on the ground that it will "save great expense to the State of Florida," this court will make such examination, and the testimony of witnesses may, in such case, by consent, be taken before a commissioner. *Id.*

HARBOR MASTER. See *Constitutional Law*, 6.

HOMESTEAD AND EXEMPTIONS. See *Equity and Equitable Jurisdiction*, 3; *Mandamus*, 1, 2.

1. A debtor who is a member of a partnership engaged in mercantile business is not entitled to select from the partnership goods levied on by virtue of an execution against him, and to have exempted to him any portion of the partnership goods under the exemption laws of this State. *State ex rel* vs. *Bowden*, 17.
2. While the rule is not universal that a power to sell includes a power to mortgage, yet a power to alienate a homestead in a prescribed manner involves the power to mortgage it in such manner. This power, existing both independent of and under the Constitution, a fair, consistent construction of the clause exempting the homestead from "forced sale," must exclude its application to a sale under a mortgage. A sale under a mortgage is not a forced sale within the meaning of the Constitution. The case of Patterson vs. Taylor and Randall, 15 Fla. 337, referred to and approved. *Hart* vs. *Sanderson's Administrators*, 103.
3. The wife having joined in the deed of mortgage of the husband conveying the homestead, and both parties in seen deed having expressly waived all benefit of exemption and homestead, and stipulated that the land conveyed shall never be claimed to the prejudice of the grantees, she having also upon a separate examination acknowledged that she made herself a party to the deed for the purpose of conveying all of her estate *in esse* or *in futuro*, cannot, upon the death of her husband, either as heir-at-law or as executrix of his will, resist a sale under a decree based upon said mortgage upon the ground that it was a forced sale, or that the homestead had not been alienated with the joint consent of the husband and wife. *Quere:* Whether in case of a testate estate the widow as heir has in any case an equity to claim the benefit of a homestead exemption enjoyed by the husband? *Id.*
4. The actual use and occupation by the owner and his family of premises designed as a homestead, is essential to impress the

HOMESTEAD AND EXEMPTIONS—(*Continued.*)
property with that character. The mere intention, at some future day, to repair and occupy them as such, where such intention is not manifested by acts as well as words, is not sufficient. *Solary* vs. *Hewlett*, 756.

5. A homestead of a person who is the head of a family residing in this State, within the meaning of the exemption clauses of the Constitution and the statutes, is the place of actual residence of the party and his family. *Oliver* vs. *Snowden*, 823.

6. A party residing in an incorporated town or city with his family, and owning land several miles from the town, cannot claim the latter as exempt from forced sale as a homestead, it having never been occupied by him as a residence. *Id.*

7. Filing a declaration or claim of homestead under the law of 1869 does not exempt the property so claimed, unless it be actually occupied as a home. *Id.*

8. As between landlord and tenant the tenant cannot claim an exemption from levy and sale of the products of the land rented as against the claim for rent or for supplies furnished by the landlord to support the tenant and his family or to cultivate the land, the title of the tenant thereto being subordinate to the lien created by the statute. *Cathcart* vs. *Turner*, 837.

9. An exemption of personal property from forced sale under legal process, to the extent of $1,000 in value, may be claimed under the Constitution, by a tenant entitled to claim exemption when his property is levied upon for the satisfaction of a claim for rent or supplies furnished by the landlord; but such exemption cannot be claimed out of the products of the land rented where an express lien exists under the statute. *Id.*

10. Section 2296 of the Revised Statutes of the United States, providing that "no lands acquired under the provisions of this Chapter [the homestead law] shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," is valid and does not violate the sovereignty of the States, and such lands cannot be subject to levy and sale to satisfy the debts mentioned in the act. The land is granted for the benefit of the family, and not for the benefit of creditors of the grantee. *Lewton et al.* vs. *Hower*, 872.

11. A general judgment recovered for "work and labor and money expended in improving" land which is the homestead of defendant cannot be enforced against the homestead. The Constitution exempts a homestead from forced sale except for taxes, or for the payment of obligations contracted for the purchase of the premises, or for the erection of improvements thereon, or for house, field or other labor performed on the same; but this exception

HOMESTEAD AND EXEMPTIONS—(*Continued.*)
does not include indebtedness for money expended in improving the land. *Id.*

HUSBAND AND WIFE. See *Administrators and Executors*, 2; *Dower; Married Women; Taxes and Tax Titles*, 22.

1. A widow, and the children born of a cohabitation during the divorce proceedings, and subsequent to a decree of divorce granted at the suit of the husband, have an equity, upon the death of the husband, to set aside such decree of divorce if it was procured by the fraud and imposition of the husband. *Rawlins* vs. *Rawlins*, 345.
2. The usual method by which the wife may set aside a fraudulent decree of divorce obtained by the husband, is a proceeding upon notice to the husband in the same case. Where, however, the husband is dead, and there are children, the result of cohabitation during the divorce proceedings, and the widow and children seek to set aside the divorce and recover their interest in the estate, they may proceed by an original bill in the nature of a bill of review against the administrator and the children born before the decree of divorce. Such a bill is not objectionable upon the ground either of misjoinder or multifariousness. *Id.*
3. Property, viz: furniture purchased by a married woman at the request of her husband, and paid for by her husband, with which they furnish a hotel where husband and wife live with their family, though the hotel business may be superintended by her, and conducted in her name, does not become separate property of the wife unless by some act of the husband indicating an intention that it shall be her separate property. Such property is the property of the husband and is liable for his debts. *Blumer* vs. *Pollock*, 707.

INDICTMENT. See *Bastardy*, 1, 4; *Criminal Law*, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 17, 18, 19, 25, 26; *Statute of Limitations*, 4, 5, 6.

INFANTS. See *Partition*, 2.

INJUNCTIONS. See *Transfer of Cause; Married Women*, 8, 12, 13.

1. An injunction may be dissolved upon motion and due notice, either before or after answer filed. *Wordehoff* vs. *Evers & Byrd*, 339.
2. In cases of pressing necessity, where the threatened injury is imminent, and the defendant could not be found in time, so that notice could not be served on him, it is not an abuse of discretion on the part of the Judge to allow an injunction without notice. *Leaton* vs. *Hower*, 872.
3. An injunction staying sale of lands wrongfully levied upon under an execution issued upon a judgment at law, upon the ground that the land is exempt from levy and sale, is not an "injunction

INJUNCTIONS—(*Continued.*)
to stay proceedings at law" within the meaning of the statute requiring notice of application therefor, and a bond in double the amount of the verdict. *Id.*
4. The levy upon land exempt by law from levy and sale, and advertising the same for sale to satisfy an execution, constitute such an attempt to cast a cloud upon the title as to give a court of equity jurisdiction to enjoin the sale. *Id.*
JUDGMENTS. See *Decrees and Judgment.*
JUDGMENT, *non-obstante veredicto.* See *Decrees and Judgments,* 6.
JUDGE OF PROBATE. See *County Commissioners.*
JUDICIAL SALES. See *Execution,* 1; *Notice.*
1. After sale under foreclosure proceedings a court of equity has power co-extensive with its jurisdiction over the subject-matter to award orders directing a party in possession to surrender to the purchaser. *Gorton* vs. *Paine,* 117.
2. As a general rule such an order will follow in cases where the party in possession was a defendant to the suit. Where, however, the person in possession is a mere stranger, who entered into possession before the suit was begun, he cannot be dispossessed by an execution on the decree. *Id.*
3. Where the subject-matter of a suit arises primarily from the relations of first and second mortgagee, with reference to the mortgaged premises, the matter is one peculiarly the subject of equible cognizance. If the second mortgagee in possession is a party to a foreclosure suit, and he claims under a tax title from the State obtained by him while he was the owner of the right and equity of the mortgagor, the purchaser under the foreclosure proceedings is not remitted to a court of law to recover possession of him. *Id.*
4. An answer to a rule to show cause why a writ of possession should not be awarded against a defendant to a suit, should set up the facts constituting his defence in such manner that they may be understood by the other party who is to answer them, and by the court giving judgment. A second mortgagee who was a party to a foreclosure suit by the first mortgagee answers to a rule to show cause why the purchaser should not be awarded possession as against him that he holds by a title derived from the State of Florida. This is not sufficiently certain, as it is possible that as the holder of one character of deed from the State he might hold by a paramount title which would put the purchaser to his action at law; while if he is the holder of a tax title, acquired while he was a second mortgagee, the court of equity has jurisdiction. *Id.*

JUDICIAL SALES—(*Continued.*)

5. Where a mortgagee bid in property for a much larger sum than the amount due by the decree of sale, under the advice of counsel that he would not be required to pay over any surplus to the mortgagor, and being advised that he is entitled to retain such surplus because he is already the owner of the property so sold, he is not entitled to be relieved from his bid on the alleged ground that he acted under a mistake of fact, the mistake alleged being purely one of law and not of fact. *Shear* vs. *Robinson*, 399.

6. A purchaser is not entitled to be relieved of his bid under such circumstances upon the additional ground that the property is worth much less than he had bid, especially when another responsible bidder offered $7,900 and the purchaser bid $8,000. *Id.*

7. A paper purporting to be a release of the complainant from the effects of his first bid at a mortgage sale, signed by the mortgagors, (a married woman and her invalid husband,) and releasing the purchaser from paying over the surplus, to which the mortgagors are entitled by the decree of sale, the assent to such paper having been obtained by the complainant by imposing upon their weakness and confidence in the absence of counsel or advice, is of no effect to curtail or control their legal or equitable rights so sought to be affected. *Id.*

JURISDICTION. See *Practice*, (*Law.*) 11; *Process*, 2; *Removal of Cause to U. S. Courts; Transfer of Causes.*

I. OF COURTS.

(1.) Supreme. See *Habeas Corpus.*

(2.) Circuit Court.

(3.) County Court and Judge. See *County Commissioners.*

(4.) Justice of the Peace. See *Bastardy*, 2.

II. EQUITY JURISDICTION. See *Equity and Equitable Jurisdiction.*

III. SPECIAL AND LIMITED. See *Bastardy*, 3.

JURORS AND JURY. See *New Trials*, 3, 4, 5, 6; *Recommendation by Jurors to Mercy.*

1. The purpose of Section 12, of sub-Chapter 13, of the Criminal Code of 1868, which provides that "no person whose opinions are such as to preclude him from finding any defendant guilty of an offence punishable with death shall be compelled or allowed to serve as a juror on the trial of such an offence," is to exclude from the jury in capital cases any person who, from scruples of conscience or some reason other than the want of sufficient proof, would refuse to find a verdict of guilty. *Metzger* vs. *State*, 481.

2. Four petit jurors had been accepted and sworn when the State Attorney learned that one of them, who had been examined on his

JURORS AND JURY—(*Continued.*)

voir dire, had, in a conversation shortly before the finding of the indictment, remarked that he was opposed to capital punishment, and argued that it would be better to imprison the accused for life than to hang him, and had, in another conversation as to the case, stated in substance that he was "opposed to capital punishment under certain circumstances, and if he was a juror would not go for capital punishment." Upon motion of the State Attorney, made before proceeding further, and supported by an affidavit as to each conversation, the Circuit Judge set aside the juror as incompetent: *Held*, 1st, that setting him aside was not error; 2d, that setting a juror aside under such circumstances is not the mere arbitrary exercise of power by the Judge, but is the exercise of judicial discretion, and his action should not be reversed unless there appears to be a departure from the exercise of a sound discretion. *Id.*

3. The affidavit of a juror is not admissible to impeach his verdict, on a motion for a new trial. He is not competent to show that the jurors, by agreement among themselves, severally marked on a paper such amount of damages as they saw fit, and that the quotient of the sum of these amounts divided by the number of jurors, was made their verdict. *McMurray and Brittain* vs. *Bassett*, 609.

4. In case of a deficiency in a grand jury, arising from the fact that some of the number named in the venire issued to the sheriff or other officer have not been summoned, or that a portion so summoned have been excused by the court for the term, it is discretionary with the court to order that such deficiency be filled, either from the list furnished by the County Commissioners, drawing from the box, or from the body of the county. *Jones* vs. *State*, 889.

5. A motion to quash a venire for petit jurors should be sustained by direct evidence. An affidavit alleging facts upon information and belief is not sufficient. *Savage and James* vs. *State*, 909.

6. Where two are jointly indicted and tried for a capital offence, each of them is entitled to twenty peremptory challenges on empannelling a jury, but the State can have but five. *Id.*

7. When the court directs the summoning of persons, by special venire, "from the county at large," and not from "by-standers," it is discretionary to reject those who have been in attendance upon the court as "by-standers, and as not included in the terms "from the county at large." This distinction is contemplated by the statute. *Id.*

8. It is not error to allow a party to withdraw a peremptory challenge and then to challenge the same person for cause: *Provided*,

JURORS AND JURY—(*Continued.*)

The person is present to be examined, or if it be shown that he is disqualified by law from being a juror. If the challenge for cause is not sustained the peremptory challenge must stand. *Id.*

9. It is not proper to allow a person called as a juror to be questioned as to whether a verdict in favor of one party would affect his social standing in the community, or produce social ostracism against him. *Id.*

10. A person is not disqualified to be a juror in a capital case because he is opposed to capital punishment, unless to find a verdict of guilty would violate his conscientious convictions on the subject of capital punishment; but the Judge is to determine the question from the evidence on the subject before him. *Id.*

11. When the record fails to show upon whose motion a person is set aside as a juror, this court will not decide whether certain questions asked of him upon his *voire dire* were proper. *Id.*

JUSTICES OF PEACE. See *Bastardy* 2; *Equity and Equitable Jurisdiction* 2.

KENO. See *Criminal Law*, 1, 2, 3.

LACHES. See *Administrators and Executors*, 6.

LAND. See *Administrators and Executors*, 3, 4, 5; *Ejectment; Notice; Riparian Rights; Specific Performance.*

Land does not pass under a deed as an appurtenance to land. *Rivas & Koopman* vs. *Solary*, 122.

LANDLORD AND TENANT. See *Lessor and Lessee.*

LARCENY. See *Criminal Law*, 14, 25, 26; *Elective Franchise.*

LESSOR AND LESSEE.

1. A party entering into possession of property as lessee for a term of years under a contract to expend $1,000 in improving the property and to divide net profits with the lessor, is under obligation to keep an accurate account of his receipts and disbursements. These accounts the lessor has a right to examine. Where the lessee fails for years to render an account, keeps his accounts, such as they are, in an awkward and unintelligible manner, and makes expenditures unauthorized by his contract, his conduct is such as not to recommend him or his statements to favorable consideration. *Harris* vs. *Ferris*, 84.

2. A lessee thus in possession is not entitled to personal compensation for managing the property. *Id.*

LIBEL. See *Damages; Charge of Judge to Jury*, 4.

LICENSES. See *Criminal Law*, 1, 2, 3.

LIEN. See *Married Women*, 16.

1. Under a contract for building a house, payments periodical except the last, for which the owner was to give the builder his note due in six months after the completion of the building, one furnishing material to the builder having filed a lien cannot maintain a suit against the owner to enforce it before the expiration of the six months, though the owner refuse to give the note to the party claiming a lien. *Pitt* vs. *Acosta*, 270.
2. In such case the party having a lien upon the building cannot exact a note payable to himself. *Id.*
3. Where, by the contract for building, payment is to be made by note, due in six months after completion, and party refuses to give the note, the present right of action is for damages for the breach of the contract, and this cannot be maintained by a person not a party to the contract, but who seeks to enforce a lien upon the building contracted for. The latter can maintain suit to enforce his lien only after the expiration of the credit mentioned. *Id.*
4. The lien in favor of persons who furnish supplies, etc., to enable a party to cultivate land and raise a crop, need not be given before the supplies are furnished, but is valid if put in writing and recorded afterward, there being no intervening equities or liens in favor of other parties. *McKeown* vs. *Cooper*, 866.

LOST PAPERS. See *Re-establishment of Papers.*

MALICIOUS PROSECUTION, ACTION FOR.

1. In an action for malicious prosecution by causing plaintiff to be arrested upon a criminal charge, the failure of the grand jury to find an indictment and the discharge of the accused by the court, constitute such a termination of the proceedings as is necessary to sustain the action. *Hower* vs. *Lewton*, 328.

MANDAMUS. See *Counties*, 6; *Equity and Equitable Jurisdiction*, 1.

1. A writ of mandamus will not lie to compel a sheriff to cause an appraisement of personal property levied on to enable the debtor in execution to select such as he desires to claim as exempt, after the property had been sold and delivered by the sheriff. *State ex rel.* vs. *Bowden*, 17.
2. An alternative writ of mandamus requiring a sheriff to cause an appraisement to be made of goods levied on, so that the debtor may select such as may be claimed to be exempt from levy and sale, should show that the debtor is a person entitled to claim the exemption. *Id.*
3. A return to an alternative writ of mandamus should, for the purpose of making an issue, set up a positive denial of facts stated, or should state other facts sufficient to defeat relator's right. A

MANDAMUS—(*Continued.*)
mere answer that a sum stated is not the correct amount is not sufficiently specific. *Canova* vs. *Commissioners of Baker*, 512.
MANSLAUGHTER. See *Criminal Law*, 8, 10.
MARRIED WOMEN. See *Husband and Wife; Mortgage*, 3; *Parties*, 3.
1. The promissory note of a married woman is void. Such note is not effective to bind her person either at law or in equity; neither the Constitution nor the statutes give her to this extent the power of a *feme sole*. *Hodges* vs. *Price*, 342.
2. Where a mortgage was executed by a married woman and her husband upon her separate property, to secure the payment of a simple promissory note made by her, the bill for the foreclosure of the mortgage not alleging that the amount so secured was the purchase-money promised to be paid by her for the said mortgaged property, or in any other way showing by his pleading that her separate property should be subject to the payment of the amount claimed: *Held*, that the complainant could not thus charge such separate property of the wife for the amount due upon such note and so secured by mortgage. *Id.*
3. When a married woman has appeared before a magistrate, having signed a deed and acknowledged it, and he certifies a full compliance with the statute, his certificate, except fraud be shown, must be held conclusive of the facts it asserts. (Agreeing with Hart vs. L'Engle *et al.*) *Shear* vs. *Robinson*, 379.
4. Where a married women carries on business in her own name, having property employed in such business, and purchases goods upon her sole credit for the purposes of such business, her separate property may be subjected in equity to the payment of claims for money due for such purchases. *Blumer* vs. *Pollak*, 707.
5. A married woman may, under the laws of this State, charge her separate property by mortgage to secure a note signed by herself and her husband; and she may charge her separate property to secure any indebtedness contracted by her for the benefit of such property or estate. *Mattair* vs. *Card*, 761.
6. When a married woman has been induced by artifice to purchase property at a price far beyond its value, and her husband joined her in giving a promissory note and in executing a mortgage on the same property and other of her separate property, the husband being intoxicated and unfit to transact business at the time of executing the securities, though the circumstances may have been such as to justify a rescission of the contract by a decree in equity, yet the parties cannot by *answer* set up such matters as a defence in a suit to foreclose the mortgage. *Id.*
7. The remedy of such mortgagors is to file a bill or a cross-bill to re-

MARRIED WOMEN—(*Continued.*)
scind the entire agreement after tendering a reconveyance and placing the other party in *statu quo*. *Id.*
8. Where the wife seeks to enjoin a sale of her separate statutory property, under an execution sued out by the creditors of her husband against him, she should bring her bill in equity through a next friend, making her husband and the plaintiffs in execution defendants, but a failure to do so is no ground to dissolve an injunction or dismiss the bill. The sheriff is not a proper party to such bill. In such case she cannot interpose a claim at law, as she is not empowered by the Constitution or the statutes to give a bond which would bind her personally, either at law or in equity, and she cannot act through a next friend at law. *Fairchild* vs. *Knight*, 770.
9. Such portion of the statutes as, anterior to the Constitution, rendered the wife's property conditionally liable to the debts of the husband, is repealed by Section 26, Article 4, of the Constitution, which creates an unconditional exemption from such debts. *Id.*
10. The Constitution, when viewed with reference to antecedent legislation, fixes the rule of construction to prevail. (Article XV., Section 2.) It is that all acts of the General Assembly, * * * *"not inconsistent"* with its provisions or with any ordinance or resolution adopted by the Convention framing it, are in force. *Id.*
11. At the time of the adoption of the Constitution married women might acquire and own two species of property, *"separate estate"* proper, which was an equitable estate, regulated mainly by the deed which created it, and *"separate statutory property,"* which, as to its incidents, was controlled principally by the statutes. The Constitution must be construed with reference to the existing law. The terms "owned by her before marriage, or acquired afterward, * * * shall be her separate property," (Article 4, Section 26,) are not *"inconsistent"* with the existence of the estates then recognized and known as "separate estate" and "separate statutory property," and they continue to exist as before, except that the conditional liability for the husband's debts is repealed. *Id.*
12. The allegations in a bill, by the wife against the judgment creditors of the husband, that property levied upon by them as the husband's was property purchased with her own means, and that she always was, and still is, the owner thereof, is a sufficient allegation of a separate property in her, and while, according to the rule prevailing in this State, she is to be held to full and strict proof of a separate property, the Chancellor should in such case grant an injunction. *Id.*

MARRIED WOMEN—(*Continued.*)

13 Where, in such cases, a motion upon affidavits before answer is made to dissolve such injunction, and the affidavit fails to deny such allegation of separate property, the injunction should not be dissolved, although, from the history of its acquisition by the wife, as stated in the bill, irregularities of a character sometimes adopted to accomplish the fraudulent purpose of screening property from debts to which it is subject are apparent, as it is possible that they may be consistent with fair dealing, and may be thus explained. *Id.*

14. A married woman cannot in this State maintain a suit in her own name, but must sue by next friend, unless in cases where she has been licensed by the Circuit Court to transact business in her own name as provided in Chapter 3130, Laws of 1879. *Smith* vs. *Smith*, 789.

15. Although it may be within the power of this court to remand the cause to the Chancellor, with directions to allow an amendment by substituting a next friend to prosecute the suit, yet, where upon looking at the pleadings and testimony, if no case is made out entitling the complainant to a decree, the decree of the court dismissing the bill will be affirmed. *Id.*

16. The estate of a married woman is not chargeable in equity merely by reason of a statutory lien for buildings and improvements, but because if she contracts such a debt it is implied that she means to pay it, and if she has a separate estate that is the fund out of which payment is contemplated. *Thrasher* vs. *Doig & Geiger*, 809.

MASTER IN CHANCERY.

1. Where the testimony upon which the master stated an account is lost, the appellant admitting that it was the principal testimony relied upon by both parties in the matter of expenditure, the action of the court sustaining the master must be presumed to be correct. In such a case, unless the appellant can show, in the absence of this testimony, "that no case could have existed, it being present," he cannot prevail. *Harris* vs. *Ferris*, 84.

2. Where, upon a second reference, after exceptions to master's first report allowed, order of confirmation having been passed as to other matters, the master corrects a mistake in an allowance made in the first report, which was not made the subject of exception thereto, such second report being in this respect outside of the second order, is erroneous to that extent. The proper method to correct this error is not to except, but to apply to the court to refer the matter back for review. Where this method is not adopted and the matter is improperly made the subject of an exception, which the chancellor overrules, this court, upon

MASTER IN CHANCERY—(*Continued.*)
appeal, will not reverse the decree if the matter of the exception was within the accounting directed by the original decree, and the presumption is that the action of the master and the court was just and proper. *Id.*
MASTER'S REPORT. See *Master in Chancery.*
MINORS. See *Partition* 2.
MISNOMER. See *Criminal Law,* 4, 5.
MORTGAGE. See *Parties,* 1; *Dower,* 1, 2; *Homestead and Exemptions,* 2, 3; *Judicial Sales,* 1, 2, 3, 4, 5, 6, 7; *Married Women,* 2, 5, 6, 7; *Taxes and Tax Titles,* 1, 2, 9.
1. A conveyance of land and other property in form, an absolute deed of bargain and sale in consideration of an indebtedness secured by a prior mortgage, (held by the grantee, who is in possession under a lease,) and of subsequent advances, said deed being executed under circumstances inducing the grantor to believe that it is intended as a security for the money named as the consideration, and the prior mortgage being foreclosed by the grantee for the entire amount named as the consideration of the deed, the mortgagor, a married woman, consenting thereto, and the prayer of the bill asking a decree of sale, and that the proceeds of the sale be applied to pay the complainant the amount of money named as the consideration of the deed and interest thereon, and the surplus, if any, to be paid to the grantors—such deed will be deemed a mortgage. *Shear vs. Robinson,* 399.
2. A decree procured by the complainant under such foreclosure proceedings, which provides that the surplus on a sale of the premises, after paying the amount named in the deed of conveyance, is to be paid to the grantor or mortgagor, is not only substantial evidence of the character of the deed as a security only, but is a judicial determination thereof. *Id.*
3. A decree in a foreclosure suit that the defendants, mortgagors, (husband and wife) pay the amount due within a certain time, and in default thereof, that the mortgaged property be sold, &c., is not a personal judgment or decree against her for money. *Mattair* vs. *Card,* 761.
4. A decree against a mortgagor for any deficiency of money due after deducting the amount realized on the sale, may be entered under the general prayer of the bill. See Equity Rule 89, which authorizes such decree and execution therefor. *Id.*
5. Decree affirmed, with directions that the court order the sale of a certain portion of the premises before selling the other part thereof, if the defendant so desire. *Id.*
MULTIFARIOUSNESS. See *Husband and Wife,* 2; *Pleading, (Equity,)* 3.

MUNICIPAL CORPORATIONS. See *Constitutional Law* 1, 2, 3, 4, 5; *Taxes and Tax Titles*, 17.

1. Municipal councils of cities and towns in this State are prohibited by law from levying taxes for other than the purposes of their own government. They have no power to lay taxes to pay the expenses of detecting and prosecuting persons charged with murder and arson. *Murphy* vs. *Jacksonville*, 318.
2. The Mayor and Council of a city or town cannot create an indebtedness to be paid by taxation by offering a reward for the apprehension and conviction of criminals punishable under the laws of this State. *Id.*

MUNICIPAL GOVERNMENT. See *Constitutional Law*, 1, 2, 4, 5; *Municipal Corporations.*

MURDER. See *Charge of Judge to Jury*, 6; *Criminal Law*, 12, 13, 21, 22, 23, 24; *Jurors and Jury*, 1, 2.

NEGOTIABLE INSTRUMENTS. See *Bills of Exchange; Contracts*, 3, 4, 5.

"NEW ASSIGNMENT." See *Pleading* (*Common Law*) 6.

NEW RIVER COUNTY. See *Counties.*

NEW TRIALS. *Writ of Error*, 5; *Jurors and Jury*, 6, 11.

1. When a right of action is clearly made out by proper proofs, and there is no conflicting or opposing evidence, a verdict of no cause of action should be set aside as being contrary to law and the evidence. *Wilson* vs. *Marks*, 322.
2. Where the testimony upon a charge of homicide is so strong and clear as to preclude the conclusion that the killing was excusable or justifiable, and that a verdict of guilty of manslaughter in the third degree is fully sustained by the evidence, the verdict should not be set aside upon the ground that the Judge did not instruct the jury fully upon the question of justifiable or excusable homicide. *Brown* vs. *State*, 472.
3. Where it is shown to the satisfaction of the court that there was no misconduct upon the part of the jurors, and it is so certified by the court in the bill of exceptions, the mere separation of the jury is not a sufficient ground for a new trial, especially is this so when the evidence upon that question produced before the court is not brought up in the bill of exceptions. *Byrd* vs. *State*, 493.
4. A verdict will not be set aside as against the weight of evidence when such evidence is so contradictory as to make it the duty of the jury so decide upon the credibility of the witnesses, although such evidence seems to preponderate against their finding, unless there is ground for belief that the jury acted through pre-

NEW TRIALS—(*Continued.*)
judice, passion, mistake or any other cause which should not properly control them. *McMurray & Brittain* vs. *Basnett*, 609.
5. In a motion for a new trial upon such ground where the court below has denied it, "it should be a very plain case to justify an Appellate Court in setting aside this concurrent conclusion of both court and jury." *Id.*
6. In regard to excessive damages, the rule is, that in actions sounding in damages, when the law furnishes no legal rule of measurement save the discretion of the jury upon the evidence before them, courts will not disturb the verdict upon the ground of excessive damages, unless it is so flagrantly improper as to evince passion, prejudice, partiality or corruption in the jury. *Id.*
7. A motion for a new trial will not be entertained at a term subsequent to the one at which a cause was tried and a verdict rendered. In order to obtain a new trial on such motion the statute must be complied with. *W. H. T.* vs. *State ex rel.*, 883.

NEXT FRIEND. See *Married Women*, 8, 14, 15.

NOTICE. See *Trusts and Trustees*, 4, 5, 6.
1. When a purchaser of land receives a deed and enters into possession, and continues in the actual occupancy, but does not record his deed, such notorious occupancy constitutes sufficient constructive notice to "subsequent purchasers or creditors" to protect the holder of the deed against the creditors of the grantor. *Massey* vs. *Hubbard*, 688.
2. Where a deed of conveyance is executed and delivered, but not recorded until after an attachment has been levied in a suit against the grantor, the lien of the attachment will bind the property as against the grantee in the deed, unless the attaching creditor had notice of the conveyance at the time of the levy of the attachment. *Carr* vs. *Thomas*, 736.

OFFICER. See *Commissioner of Deeds and other Particular Officers; Criminal Law*, 4, 5.

ORIGINAL BILL IN THE NATURE OF A BILL OF REVIEW. See *Husband and Wife*, 2.

PARTIES. See *Appeals*, 3; *Decrees and Judgment*, 2; *Judicial Sales*, 1, 2, 4; *Married Women*, 8, 14, 15; *Sheriff*.
1. In foreclosing a mortgage, a *cestui que trust* is not a necessary party defendant, where the mortgagor holds the legal title under a secret trust, as the trustee represents the *cestui que trust*. *Young* vs. *Whitney*, 54.
2. When pending a suit in equity to enforce the specific performance of an agreement to convey lands, the principal defendant dies, the suit abates, and must be revived as prescribed by the rules

PARTIES—*Continued.*)
and practice of the court against the legal representatives, before decree can be made in that suit directing a conveyance. *Mitchell* vs. *Wamble*, 169.
3. Upon bill filed to charge property with debts contracted by an alleged owner for improvement thereon it is disclosed that the property is the separate estate of a married woman and her children, who are not parties to the suit, the bill should be amended by making them parties with allegations to establish the liability of their estate. *Thrasher* vs. *Doig & Geiger*, 809.
PARTITION.
1. Administrators cannot maintain. *Whitlock* vs. *Willard*, 156.
2. In a suit for partition, under the statute, process should be served upon a minor defendant before a guardian *ad litem* is appointed. *Brock* vs. *Doyle*, 172.
3. In partition it is not essential that the shares assigned to the several parties should be exactly equal, as the parties who receive more than their share of the estate may be required to make a pecuniary compensation to those who receive less. *Id.*
PARTNERS AND PARTNERSHIP. See *Homestead and Exemptions.*
A. and B. ship a cargo of yellow pine-piles to New York City on their joint account, upon the agreement that they would bear equally the expenses thereof, and share equally in the profits and proceeds of the shipment. A. advances to B. on account of the shipment $284, and settles a loss of $1,204 incurred in the venture. The parties are partners, and in the absence of any settlement or balance struck, or covenant to account by the partners or promise expressed or implied, the remedy of A. is in equity and not at law. *Price* vs. *Drew*, 670.
PENSACOLA, HARBOR MASTER OF PORT OF. See *Constitutional Law*, 6.
PERJURY. See *Criminal Law*, 15.
PERSONAL PROPERTY. See *Contracts; Partners and Partnership*, 1.
PLEA. See *Pleading; Practice, (Law)* 3, 4; See *Practice, (Equity)* 5, 6.
PLEA AND ANSWER. See *Practice, (Equity)* 6.
PLEADING.
I. COMMON LAW. See *Ejectment*, 1, 2, 8, 12, 14; *Mandamus*, 3; *Practice, (Law)* 3, 4, 5, 6, 10, 11; *Puis darrein continuance; Quo Warranto; Repleader; Replevin.*
1. A defence upon equitable grounds, which sets up as the substantial equity a defence at law, such defence at law having been already

PLEADING—(*Continued.*)
interposed by plea (such plea being a good plea) should be disallowed. *Florida Central Company* vs. *Bisbee*, 60.
2. Where, in a common law action, a defence on equitable grounds consists of matter clearly available as a defence at law, the court, without motion, should strike it out. Such a defense is admissible only when it sets up matter which, in the event of a judgment at law, equity would on account of the *equities set up* give him relief against the judgment, and if a party having a good defence at law fails to plead it in the action at law, equity will not grant any relief against the judgment. *Quere:* Whether such a defence is admissible in an action of ejectment? *Spratt* vs. *Price*, 289.
3. Rules as to pleading title acquired subsequent to issue joined. *Spratt* vs. *Price*, 289.
4. A demurrer to a plea, however bad the plea may be, reaches back to the declaration, and if that be bad the judgment overruling the demurrer must be sustained. *Murphy* vs. *Jacksonville*, 318.
5. It is not error to refuse to strike out a special plea upon the alleged ground that the matters therein stated are not responsive to the allegations of the declaration and do not constitute a defence. The plaintiff should demur. ***Wilson* vs. *Marks*, 322.**
6. In an action for libellous publication charging that plaintiff had committed perjury in a matter of a "final homestead proof," defendant by a special plea of justification alleges that plaintiff committed perjury in a certain affidavit made for the purpose of proving a right of homestead entry in behalf of one P., and afterwards filed a further special plea alleging perjury by plaintiff in another similar affidavit made in behalf of himself, a "new assignment" by plaintiff to the effect that the defendant in the libellous publication charged the perjury to have been committed in the former affidavit and not in the latter, is not an appropriate pleading. A "new assignment" is proper only where there were two causes of action and the declaration is so general as apparently to cover both, and the plea sets up a defence to one; the new assignment being in aid of the declaration to designate which of the two several causes of action was intended to be declared on. *Id.*
7. Under the law of this State permitting a party to plead and demur to the same pleading at the same time, it is proper to allow a demurrer to be filed on a day subsequent to the filing of a plea in bar, it being the intent of the law to allow issues of law and of fact to exist at the same time. *Wade* vs. *Doyle*, 630.
8. An amendment to a declaration, after plea filed, by interlining in the original the partnership name of the defendants, as the name was stated in the plea, no objection having been made to such

PLEADING—(*Continued.*)
mode of amendment is not an irregularity of which the court will take notice. *Hyer* vs. *Vaughn*, 647.
9. In a declaration in a suit by the purchaser against the seller for breach of a contract by the seller who engages to deliver 2,500 pieces of timber "as fast as water will permit, and to be completed not later than the 15th of June," it is essential to allege that the water was such as to permit the delivery, this being evidently a condition of the contract to deliver. *Id.*
10. A demurrer by a plaintiff to a plea of the defendant reaches essential defects in the declaration, and if that be defective the demurrer to the plea should not be sustained. *Id.*
11. Where there is a demurrer to a plea restricted to one count in a declaration, and there are issues of fact upon other counts in the declaration, the court in giving judgment upon the demurrer, looks only to that part of the record upon which it arises, and if both the count and plea are bad in law, the judgment upon the demurrer is against the count. *Price* vs. *Drew*, 670.
12. A demurrer to a plea to the whole declaration should be sustained if there are any good counts in the declaration to which it sets up no answer in law. *Id.*
II. EQUITY. See *Cross bil and other particular Pleadings; Practice (Equity)* 3, 4, 5, 6, 8; *Married Women*, 2, 12, 13.
1. Where there has been a final hearing, an appeal, a reversal of the decree and a remanding of the cause, as a general rule, an amendment to an answer by the addition of facts which, if they existed, must have been known at the time of the filing of the original answer, will not be allowed. Such an amendment should never be allowed in cases where the facts constituting the defense to be set up are not upon the showing made, rendered highly probable, if not certain, nor should it be permitted where (independent of defendant's conclusions) the *facts* desired to be added are not clearly material to the defense. *Hart* vs. *Sanderson's Administrators*, 103.
2. Upon hearing upon bill, plea and answer in support of plea, every fact stated in the bill, and not denied by the plea or the answer in support thereof, must be taken as true, so also must the facts stated in the plea and answer be taken to be true. *Id.*
3. A bill in the nature of a creditor's bill is not multifarious because it prays discovery and relief against several who are not united in interest, and who may be strangers to each other, as the object of the bill is to reach sundry assets of principal defendants in their several possession. *Hayden* vs. *Thrasher*, 795.
4. A bill is not strictly a bill of discovery if it prays a discovery of facts when the discovery prayed and the allegations are not

PLEADING—(*Continued.*)
separate and distinct from the main object of the bill. *Thrasher* vs. *Doig & Geiger*, 809.
III. IN PROBATE COURT PROCEEDINGS. See *Administrators and Executors*, 5.
IV. CRIMINAL. See *Indictment.*
POWERS. See *Deeds*, 4.
PRACTICE. See *Removal of Causes to U.S. Courts*, 5; *Re-establishment of Papers*, 1.
I. IN SUPREME COURT. See *Appellate Practice.*
II. LAW. See *Arrest of Judgment; Damages; Decrees and Judgments*, 3, 4, 5, 6, 7; *New Trial; Pleading*, (*Common Law*) 1, 2, 3, 4, 5, 6, 7, 8, 11, 12; *Process; Verdict.*
1. Where an attorney appears "specially, not waiving the right to take advantage of errors and defects in the summons, or to move for a dismissal of the cause on account thereof," this is not a general appearance waiving the very defects indicated. *Tidwell* vs. *Witherspoon*, 282.
2. Where a clerk has entered defendant's appearance by an attorney, and the attorney testifies that he did not authorize such entry, which statement is not contradicted, the clerk's memorandum cannot bind the attorney or the party. *Id.*
3. Where a default is entered for want of a plea, and there is sufficient cause shown for setting it aside and granting leave to plead, and an order is made to plead instanter, if the time allowed is not sufficient, application should be made to the court to enlarge the time. The judgment of the attorney that more time is necessary is no legal excuse for non-compliance with the order. *Id.*
4. The neglect of an attorney to file a plea under a rule of court fixing the time of pleading, should not operate to the prejudice of the party on his application to set aside a second default, upon his tendering a good plea and an affidavit of merits with a sworn statement showing that he is without fault, especially where the neglect of the attorney was not such as to give a right of action against him for negligence. *Id.*
5. The neglect of an attorney to prepare and file a plea, caused by his being summoned to a distant place on account of the serious illness of his wife, even though he might have made arrangements with another attorney to prepare it, or might have notified his client, yet did not do so because of his anxiety for his family, is not such neglect as should operate to the prejudice of his client. *Id.*
6. While the granting or refusal of an application to open a default for not pleading is in the sound discretion of the court, yet this discretion is the subject of review on appeal. *Id.*

PRACTICE—(*Continued.*)

7. The taking of original records or papers from the clerk's office by attorneys without leave of the court is reprehensible, and should not to be permitted by the clerk. *Id.*
8. Striking out equitable pleas. *Florida Central Company* vs. *Bisbee*, 60; *Spratt* vs. *Price*, 289.
9. It is not error to refuse to strike out special plea on ground that its statements are not responsive, and do not constitute a defence. Plaintiff should demur. *Wilson* vs. *Marks*, 322.
10. On sustaining a demurrer to a declaration upon the ground that the facts stated were insufficient to maintain the action, there being no question of jurisdiction, it is error to dismiss the suit for want of a declaration. The final judgment should have been upon the demurrer, the plaintiff failing to amend. *Hower* vs. *Lewton*, 328.
11. Under rule thirteen (13) of the Rules of Practice of the Circuit Courts a declaration is required to be filed on the rule day upon which the defendant is required to appear by a summon duly served and returned. Until service and return of process no declaration is required to be filed. *Cook* vs. *Cook*, 634.

III. CODE. See *Appeals*, 6, 7, 8, 9; *Costs.*

IV. EQUITY. See *Appeals* 13; *Attachment; Cross Bill and other particular bills in chancery; Divorce; Equity and Equitable Jurisdiction; Husband and Wife; Injunctions*, 2; *Judicial Sales*, 1, 2, 3, 4; *Married Women*, 8, 13; *Master in Chancery; Mortgages*, 3, 4, 5; *Parties*, 1, 2; *Partition*, 2, 3; *Pleading*, (*Equity*,) 1, 2; *Transfer of Cause.*

1. Where the proofs offered by a plaintiff in support of his case leave the matter in such doubt and uncertainty that it is impossible for the court to do justice or make specific decree, the bill should be dismissed. *Marvin* vs. *Hampton*, 131.
2. Where before final hearing a suit is dismissed as to a defendant in the absence of a transcript of the record in which the order is made, or of any positive evidence of the ground of the order, the court cannot presume in a collateral suit that the judgment subsequently rendered against the other defendant was binding upon the defendant as to whom it was dismissed, or that the order dismissing the suit was an adjudication in favor of the defendant. *Id.*
3. A defendant, relying upon the defence that the same matter was in issue and determined in a former suit, should set forth so much of the former proceeding as will show that the same point was then in issue and determined, and should aver that the allegations as to the title to relief were substantially the same in the second bill as in the first. *Id.*

PRACTICE—(*Continued.*)

4. The objection to a supplemental bill in equity made at the hearing, that it seeks to maintain the suit upon new facts, which have occurred since the filing of the original bill, and which make a new case, cannot be heard. Such an objection is waived by omitting to demur to the bill upon that ground and going into a hearing upon the merits. *Crump* vs. *Perkins*, 353.
5. Upon sustaining a plea it is not a matter of course for the court to direct or award an issue. The plaintiff should ask leave to put the facts of the plea in issue, or should undertake to reply, if he so desires. Where the notice by the plaintiff of the hearing upon the plea was accompanied by a notice of hearing upon the merits to be had next day, and for a final determination, the court very properly presumed that the plaintiff, instead of wishing to reply to the plea, desired the action of the court to be final. *Id.*
6. A plea and answer in support thereof is one pleading. Such answer is no distinct part of the defense. It must be treated as a part of the plea. While a replication in such case restricted to the answer is improper, yet after it is treated by the court and the parties as putting in issue the matters of fact alleged in the plea and answer, and after testimony applicable to such issue, and setting the cause down for final hearing and decree upon the merits, this court will not, upon appeal, reverse such decree, unless there is error upon the merits. *Id.*
7. Where parties proceed to a hearing of a suit in equity all the allegations of the answer responsive to the bill are taken as true unless they are disproved by evidence of greater weight than the testimony of a single witness. *Carr* vs. *Thomas*, 736.
8. When the time for taking testimony in chancery causes has expired by the rules, it is within the sound discretion of the court to extend the time upon good cause shown. *Tuten* vs. *Gazan*, 751.

V. CRIMINAL. See *Criminal Law*, 5, 6, 16, 19, 20, 24; *Charge of Judge to Jury*, 10, 11; *Decrees and Judgments*, 1, 2,; *Dying Declarations*, 2; *Evidence and Witnesses*, 16; *Jurors and Jury*, 1, 2, 4, 5, 6, 7, 8, 9, 10, 11; *Recommendation to Mercy by Jurors.*

PRINCIPAL AND AGENT. See *Estoppel.*

PRINCIPAL AND SURETY. See *Pleading (Equity)* 3.

1. Where a surety becomes liable by signing at the request of a co-surety, who agrees to indemnify and save him harmless, he may, after the money becomes due, maintain a bill in equity to compel the co-surety to pay the debt and save him harmless, not only as to money he has paid, but also as to whatever he is liable to pay on account of being such surety. *Hayden* vs. *Thrasher*, 795.

PRINCIPAL AND SURETY—(*Continued.*)

2. In such case, where fraudulent conduct on the part of the co-surety who ought to pay the debt is shown, not only in the inception of the liability, but in the disposition of his property, a writ of injunction and such other process as may be necessary may be prayed in the first instance to prevent fraudulent transfers, and to hold property and assets to the relief of the surety entitled to protection, and it is not necessary to obtain judgment at law against the co-surety before filing such bill. *Id.*

PRIORITY. See *Attachment; Notice.*

PRIVITY. See *Attorneys at Law*, 2; *Decrees and Judgments*, 1; *Lien*, 2.

PROCESS. See *Minors; Partition*, 2; *Practice*, (*Law.*) 1; *Writ of Error*, 2.

1. That a paper purporting to be a copy of a summons served by the sheriff was not a true copy of the original on which a return of service was made, is not good ground of motion to dismiss the suit, but only to set aside the return of service, if the defect or variance is material. *Tidwell* vs. *Witherspoon*, 282.

2. A sheriff's return of due service of a summons in the manner prescribed by law is conclusive as to jurisdiction of parties, unless the same is impeached by satisfactory evidence. *Id.*

PROMISSORY NOTES. See *Bills of Exchange; Evidence and Witnesses*, 6, 7, 8; *Lien*, 1, 2, 3; *Married Women*, 1, 2, 6,

PUIS DARRIEN CONTINUANCE, PLEA. See *Ejectment* 8; *Taxes and Tax Titles*, 21.

QUO WARRANTO.

Where the pleadings in a proceeding by information in the nature of a *quo warranto* show a good cause of action in favor of the State, it is immaterial whether the person upon whose relation the information is filed establishes his title to the office. There is nothing in Chapter 1874, Laws, which changes this rule. *Lake* vs. *State ex rel.* 501.

RAILROADS. See *Counties.*

RECEIVER. See *Attorneys at Law*, 2; *Decrees and Judgment*, 1.

RECOMMENDATION BY JURY TO MERCY. See *Charge of Judge to Jury*, 10.

RECORDS. See *Bill of Exceptions; Costs*, 2; *Evidence and Witnesses*, 10; *Practice* (*Law*) 7; *Record of Deeds.*

Taking original from Clerk's office by attorney reprehensible and not permissible. *Tidwell* vs. *Witherspoon*, 282.

RECORD OF DEEDS, STATUTE AS TO. See *Constitutional Law*, 7; *Notice; Evidence and Witnesses*, 10.

RE-ESTABLISHMENT OF PAPERS.

In a proceeding to re-establish certain bonds executed by the officers of one county and burned while in possession of the officers of another county, the latter being the payee, the former pleaded to the petition for the re-establishment that the bonds were not lawfully delivered; that they were illegal and void for fraud, want of consideration; that the bonds were satisfied and no liability ever existed: *Held*, That these and kindred matters constituted no valid objection to the re-establishment, but were matters of defence to be set up in proceedings to enforce the bonds. *Commissioners of Suwannee* vs. *Commissioners of Columbia*, 78.

REFEREE. See *Equity and Equitable Jurisdiction*, 4.

RELEASE. See *Judicial Sales*, 7.

REMOVAL OF CAUSE TO U. S. COURT.

A State Court is not bound to surrender its jurisdiction upon a petition for removal to the courts of the United States until a petition is filed, which, upon its face, shows the right of the petitioner to the transfer. In such petition it is not enough to allege that the petitioners were resident in another State. They must allege that they were citizens. *Brock* vs. *Doyle*, 172.

REMOVAL OF COUNTY SITE. See *County Site*.

RENT. See *Lessor and Lessee*.

REPLEADER. See *Decrees and Judgments*, 7.

REPLICATION. See *Practice*, (*Equity*) 6.

REPLEVIN.

In an action for the taking and detention of personal property the plea of not guilty puts in issue the taking and detention, and not the right of property and possession of the plaintiff. (C. C. Rule 75.) *Stewart* vs. *Mills*, 57.

RES ADJUDICATA. See *Stare Decisis*.

RES GESTAE. See *Criminal Law*, 15, 17.

REVIVOR. See *Parties*, 2.

RIPARIAN RIGHTS.

1. Under the provisions of the act of December 27th, 1856, entitled "An act to Benefit Commerce," all the title of the State to the submerged land extending from the low water mark to the channel of the river was vested in the then riparian proprietor, and such proprietor had the right, subject to the conditions of the law, to convey that portion of the submerged land which extended from low water mark to the channel. *Rivas & Koopman* vs. *Solary*, 122.

RIPARIAN RIGHTS—(*Continued.*)

2. Where the metes and bounds of a deed executed by such riparian proprietor do not extend to the channel, but are fixed without reference to the river as a boundary, the grantor retaining possession of structures upon the submerged land, and the grantee understanding that he got no title thereto, the title to the submerged land remains in the original riparian proprietor, and can be made the subject of a grant by him. *Id.*

SALES. See *Contracts; Execution; Judicial Sales.*

SCIRE FACIAS AD AUDIENDUM ERRORES. See *Writ of Error*, 2.

SECRETARY OF STATE.

Certified copies of papers and records lawfully kept in office of made competent evidence as originals would be. *Tuten* vs. *Gazan*, 751.

SENTENCE. See *Criminal Law*, 16, 24.

SEPARATE ESTATE. See *Married Women*, 1, 3.

SEPARATE STATUTORY PROPERTY. See *Married Women.*

SHERIFF. See *Equity and Equitable Jurisdiction*, 6; *Married Women.*

SPECIFIC PERFORMANCE. See *Parties*, 2.

STARE DECISIS.

While any principles applicable to the facts in the present case which were announced in an antecedent case between different parties, should have the weight of precedent and authority, both in the Circuit Court and in this court, still, when the cases are not identical, to the extent of the difference the principles first announced cease to be controlling. *Hogans* vs. *Carruth*, 587.

STATE.

When not entitled to writ of error in criminal cases. See *Writ of Error*, 3.

STATUTE OF LIMITATIONS. See *Administrators and Executors*, 6; *Ejectment*, 1, 2, 4, 5.

1. A suit in equity claiming dower and mesne profits is not an action for the recovery of real property based upon the seizin or possession of the plaintiff, her ancestor, predecessor or grantor. *Branch* vs. *Cole*, 368.

2. A suit in equity claiming dower and mesne profit is "an action for relief not hereinbefore provided for," within the meaning of the twelfth section of the act of limitations of this State. *Id.*

3. The limitation to an action on a contract obligation or liability not founded upon an instrument of writing, such as is set up in the *indebitatus assumpsit* counts for money paid, for money found to be due, and for money payable, in this case is three years. *Price* vs. *Drew*, 670.

STATUTE OF LIMITATIONS—(*Continued.*)

4. Fractions of days are not regarded in law, except when justice requires a careful examination as to the precise time of day at which an act was performed, in order to do right as between parties. *Savage* vs. *State*, 970.

5. Where time is to be computed from a particular day, or when an act is to be performed within a specified period, as from or after a day named, the rule is to exclude the first day designated, and to include the last day of the specified period. *Id.*

6. An indictment found on the thirteenth day of December, 1880, for an offence alleged to have been committed on the thirteenth day of December, 1878, is good, the offence not being barred by the statute of limitations. *Id.*

STATUTES, AND STATUTORY CONSTRUCTION. See *Constitutional Law*, 1, 2, 3; *Elective Franchise; Taxes and Tax Titles*, 10.

Statute laws of other States must be proved before the courts of this State like other facts or evidence. *Tuten* vs. *Gazan*, 751.

STATUTES CONSTRUED AND REFERRED TO.

ADMINISTRATORS AND EXECUTORS.

Thompson's Digest, 196, Section 5.
Rawlins vs. Rawlins, 346.
Chapter 1732, Section 4, (A. D. 1870.)
Deans vs. Wilcoxon, 531.

APPEALS. See *Sub-title "Code of Civil Procedure."*

Thompson's Digest, 448, Section 1.
Harris vs. Ferris, 81.

BANKRUPTCY.

Act of U. S. Congress of 1867, Section 34, 14, &c.
Chipley vs. Frierson, 639.
Carr vs. Thomas, 736.

BASTARDY.

Thompson's Digest, 228.
E. D. P. vs. State ex rel, 175.
W. H. T. vs. State ex rel, 883.

BILL OF EXCEPTIONS.

Thompson's Digest, 351.
Sams vs. King, 553.

BILLS OF EXCHANGE.

Thompson's Digest, 331, Section 24.
Livingston vs. Boberts' Executor, 70.

Metzger vs State, 481.
CODE OF CIVIL PROCEDURE.
Sedgwick vs. Dawkins, 335.
COMMISSIONERS OF DEEDS.
McC's. Digest, 185, 218.
Tuten vs. Gazan, 751.
COUNTY AND COUNTY SITE.
Chapter 1890, (A. D. 1872.)
Lanier vs. Padgett, 842.
CRIMES. See *Sub-title "Jurors."*
ATTEMPTS TO COMMIT.
Chapter 1637, (Sub-chapter 12,) Sections 6 and 8, (A. D. 18
Stevens vs. State, 903.
BURGLARY WITH INTENT TO COMMIT LARCENY.
Chapter 1637, (Sub-chapter 4,) Section 12, (A. D. 1868.)
Jones vs. State, 889.
Wood vs. State, 967.
CHALLENGE OF JURORS. See *Sub-title "Jurors."*
GRAND JURY.
Chapter 1628, Section 32, (A. D. 1868,); Chapter 2046, (A
1875.)
Jones vs. State, 889.
INDICTMENT. See *Sub-title "Grand Jury."*
Thompson's Digest, 522.
Alden vs. State, 187.
Chapter 1637, (Sub-chapter 3,) Sections 1, 2.
Byrd vs. State, 493.
HABEAS CORPUS.
Chapter 3129, (A. D. 1879.)
Exparte Egan.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

KENO.

Thompson's Digest 500, Section 1; Chapter 3099, Sections 11, 12, (A. D. 1879.)

Oberby vs. State, 178.

Hazen vs. State, 184.

MANSLAUGHTER.

Chapter 1637, (Sub-chapter 3,) Section 14, (A. D. 1868.)

Brown vs. State, 472.

MURDER.

Chapter 1637, Sub-title 3, Sections 1, 2.

Savage and James vs. State, 909.

OBTAINING PROPERTY UNDER FALSE PRETENCES.

Chapter 1637, Sub-chapter 3, Section 50.

Pendry vs. State, 191.

PETIT LARCENY.

Convict of cannot vote, Chapter 1625, Section 5, (A. D. 1868.)

State ex rel. vs. Buckman, 267.

RECOMMENDATION TO MERCY BY JURORS.

Chapter 1877, (A. D. 1872.)

Metzger vs. State, 481.

SENTENCE.

McClelland's Digest, 451, Section 37.

Robinson vs. State, 898.

Parrish vs. State, 902.

Savage and James vs. State, 909.

DEEDS, ACKNOWLEDGEMENT, &C., OF.

Thompson's Digest, 180, Section 4, 343; Section 7.

Hogans vs. Carruth, 587.

Chapter 1939, (A. D. 1873.)

Carr vs. Thomas, 736.

ELECTIVE FRANCHISE, CONVICTION OF PETTY LARCENY TAKES AWAY.

Chapter 1625, Section 6, (A. D. 1868.)

State ex rel. vs. Buckman, 267.

EVIDENCE.

Certified copies of books, &c., in office of Secretary of State.

McC's Digest, 513, Section 1.

Tuten vs. Gazan, 761.

Statutes of other States.

McC's Digest, 514, Section 4.

Tuten vs. Gazan, 751.

Cathcart vs. Turner, 837.
Section 2296, U. S. Revised Statutes.
Lewton et al. vs. Hower, 842.
INJUNCTIONS.
Thompson's Digest, 433, Section 1.
Wordehoff vs. Evers & Byrd, 339.
JURORS.
Chapter 1637, sub-Chapter 13, Section 12.
Metzger vs. State, 481.
Savage and James vs. State, 909.
Chapter 3010, Section 7, (A. D. 1877.)
Savage and James vs. State, 909.
LIEN.
LANDLORDS' LIEN. See *Sub-title Homestead Exemptions*
LIEN FOR SUPPLIES.
Chapter 1739, (A. D. 1870.)
McKeown vs. Coogler, 866.
LIEN, STATUTORY FOR MATERIALS FURNISHED FOR BUILDING
Chapter 3042, (A. D. 1877.)
Pitt vs. Acosta, 270.
LIMITATION OF REMEDIES.
Chapter 1869, (A. D. 1872.)
Seymour & Simpson vs. Creswell, 29.
Branch vs. Cole, 368.
Price vs. Drew, 670.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

Record of separate property; Thompson's Digest, 221, Section 8.

Fairchild vs. Knight, 770.

Separate examination as to conveyances, &c.; Thompson's Digest, 178-9.

Shear vs. Robinson, 379.

Hart vs. Sanderson's Administrators, 103.

Statutory lien on property; Chapter 3042, (A. D. 1877.)

Thrasher vs. Doig & Geiger, 809.

MUNICIPAL GOVERNMENT. See *Board of Health.*

Chapter 3316, (A. D. 1881.)

State ex rel. vs. Stark, 255.

Chapter 1688, (A. D. 1869.)

Murphy vs. Jacksonville, 318.

NEW TRIAL.

Chapter 521, (A. D. 1853.)

Knox vs. Barnett, 594.

NOTICE TO CREDITORS AND SUBSEQUENT PURCHASERS.

McClellan's Digest, 215.

Massey vs. Hubbard, 688.

PLEADING. See *Sub-title "Quo Warranto."*

Thompson's Digest, 332, Section 1.

Chapter 1096, Section 74, (A. D. 1861.)

E. D. P. vs. State ex rel., 175.

Chapter 1095, (A. D. 1861,) Section 69.

Florida Central Company vs. Bisbee, 60

Chapter 1096, Section 34.

Wade vs. Doyle, 630.

Chapter 1938, (A. D. 1873.)

Cook vs. Cook, 634.

QUO WARRANTO.

Chapter 1874 (A. D. 1872.)

Lake vs. State ex rel., 501.

RE-ESTABLISHMENT OF PAPERS.

Chapter 3019, (A. D. 1877.)

Commissioners of Suwannee vs. Commissioners of Columbia, 78.

RIPARIAN RIGHTS.

McClellan's Digest, 689-90, (A. D. 1856.)

Rivas & Koopman vs. Solary, 122.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)
SCHOOLS.
Superintendent of; Chapter 1686, Section 2, (A. D. 1869.)
Alden vs. State, 187.
TAXES.
Chapter 3099, Section 3, (A. D. 1879.)
Lamar vs. Palmer, 147.
Chapter 1976, Sections 6, 50, (A. D. 1874.)
Spratt vs. *Price*, 289.
Chapter 1887, (A. D. 1872; Chapter 1976, Sections 60, 61 and 63.
Sammis vs. King, 557.
Paul vs. Fries, 573.
TRANSFER OF CAUSE FROM ONE CIRCUIT TO ANOTHER.
Chapter 373, (A. D. 1851.)
Fairchild vs. Knight, 770.
WRIT OF ERROR.
Thompson's Digest, 447, Section 4.
Weiskoph vs. Dibble, 22.
STATUTORY LIEN. See *Lien; Married Women*, 16.
SUPPLEMENTAL BILL. See *Practice*, (*Equity*) 4.
SUPERSEDEAS. See *Writ of Error*, 1.
SURVEY. See *Ejectment*, 3, 6.
SUWANNEE COUNTY. See *Establishment of Records.*
TAX PAYERS. See *County Site; Taxes and Tax Titles.*
TAXES AND TAX TITLES. See *Criminal Law*, 1, 2, 3; *Judicial Sales*, 4; *Licenses; Municipal Corporations.*
1. The owner of promissory notes or other credits, whether secured by mortgage or not, so secured, is liable to be taxed upon the value of such credits. *Lamar* vs. *Palmer*, 147.
2. A tax upon notes or obligations secured by mortgage upon land, the land mortgaged also being taxed, does not present a case of double or unequal taxation. *Id.*
3. "Debts due from solvent debtors," taxable by the terms of the statute, refers not to the general solvency of the debtor, but to the amount of the debt which may be realized or collected; *i. e.*, the value of the debts. *Id.*
4. Under the statute of 1874 the lien for taxes assessed related to the first of March. Such lien attached to the *res* without regard to individual ownership, and when enforced by sale pursuant to the statute, the purchaser took a valid title in fee. *Spratt* vs. *Price*, 289.

TAXES AND TAX TITLES—(*Continued.*)

5. A purchaser at a tax sale has, during the period allowed for redemption, no estate, legal or equitable, in the land. He has a lien for the purchase money and interest allowed by the statute. *Id.*

6. The owner, occupant, or other party subject to the assessment under the terms of the statute, is the proper person against whom to assess a tax during the period of redemption, and if a sale for taxes thus assessed is had after the period of redemption expires, and after the purchaser at the first sale has obtained a deed, a good title in fee passes to the purchaser at the second sale. The law gives no immunity to the purchaser at the first sale. *Id.*

7. The terms duty and obligation are used in reference to taxes in two senses: the first being in reference to the sovereign imposing the tax, and the second in reference to individual relations. The matter of duty to the State is fixed by the legislative enactment imposing the tax. The matter of obligations between individuals arises from the legal or equitable relations of the parties *inter se*. In neither case is an obligation or duty fixed by the mere fact of ownership in the land. *Id.*

8. Every person who has or claims an estate in land has not for that reason a claim or right against every other person claiming or having an estate in the land by which his adversary claimant is bound to pay the taxes. *Id.*

9. Where the tax under which a second sale was had was assessed against a mortgagor in possession during the time allowed for redemption from first sale, there was no duty upon the part of the mortgagee out of possession to the stranger who had purchased at the first sale to pay this tax, and he could bid and acquire a good title at the second sale. *Id.*

10. Where the last clause of one section of a statute is plainly inconsistent with the first portion of the same section, and with another preceding section of the statute; and this section and part of section conform to the obvious policy and intent of the Legislature, the last clause, if operative at all, must be so construed as to give it an effect consistent with the other section and part of section and with the policy they indicate. Hence the last clause of Section 63, Chapter 1976, Laws, which provides that "the validity of any sale for taxes under this act, or of any title acquired by, through, or under such sale, shall only be affected or questioned by alleging and proving that the property sold was not subject to taxation, or that the taxes had been paid before such sale, or that the property so sold had been redeemed according to law," must be so construed as not to repeal the law in so

TAXES AND TAX TITLES—(*Continued.*)

far as it provides that not until one year after the recording of the tax deed it should be only *prima facie* evidence of regularity and title. (Sections 60 and 63, Chapter 1976, Laws.) *Sams* vs. *King*, 557.

11. A statute providing that a tax deed shall be *prima facie* evidence of the regularity of the proceedings from the valuation of the land by the Assessors to the date of the deed, inclusive, and of the title of the purchaser, is within the admitted power of the Legislature to regulate the method of proceeding in the introduction of testimony. *Quere:* Has the Legislature power to make the deed, after it has been recorded one year, conclusive evidence of such facts, and limit the action to recover to cases in which the ground of relief is that the land was not subject to taxation, or that the taxes were paid or tendered, or that the property had been redeemed? *Id.*

12. The presumption of regularity which attaches to a tax deed must prevail in its favor until evidence given of facts which show irregularity. It is not enough to prove facts from which irregularity may be inferred. The presumption must prevail until facts inconsistent with it are shown. The testimony of the Clerk of the Circuit Court that he had, at a previous date, examined the records of his office and did not think that there was any record of the tax sale, but that he would not, without further examination, swear to the fact positively, is not sufficient to overthrow the presumption of regularity, and a verdict of the jury based upon such testimony should be set aside. *Id.*

13. The power of a Collector of Revenue to enforce by sale the collection of taxes continues until the taxes are collected, notwithstanding the warrant of the Assessor directs a return or report of collections upon a particular day. *Id.*

14. The description of the land upon the assessment roll is sufficiently certain if, by looking at the entire roll, it is seen that the land sold is the land taxed. *Id.*

15. The statute directs the clerk to make a deed to the purchaser, his heirs or assigns. The act of the clerk in making such deed to a person claiming and purporting to be the heir of the purchaser is not a judicial determination of that fact in the sense that it is binding upon the true heir, or any party having the right to raise the question. The Legislature, by virtue of its general power to prescribe the method of collecting taxes, can impose this duty upon the clerk. *Id.*

16. A tax deed for land sold for State and county taxes is properly executed in the name of the State by the Clerk of the Cir-

TAXES AND TAX TITLES—(*Continued.*)
cuit Court for the county in which the land was situated. He is the County Clerk within the meaning of the Legislature. *Id.*
17. A tax deed after sale of land due for city taxes should be in the name of the city, and not in the name of the State.
18. When several tax deeds upon the same property are held by the same party as grantee, and the eldest is good to vest title in him, the subsequent deeds are merely evidence of the payment of taxes, and give him no title, as he already had it. *Paul* vs. *Fries*, 573.
19. A paper purporting to be a tax deed is not executed within the meaning of the statute so as to convey the property, unless it is attested by subscribing witnesses (under the revenue law of 1874). *Id.*
20. Where in an ejectment a deed not executed so as to convey the land is given in evidence without objection, and no point is made either in the Circuit Court or on appeal that the deed is invalid in that respect, yet this court cannot permit such deed to have operation as a conveyance and give it effect by our silence. *Id.*
21. If the plaintiff has not a legal title at the time of commencement of his suit in ejectment, he cannot recover. An equitable interest ripening into a legal title, after suit brought, cannot have relation to the former equitable interest so as to give a right of possession at the inception of the suit. And so a tax deed executed on the day of trial cannot be given effect in favor of the plaintiff, although he might have held the certificate of sale and might have had a deed before suit. The rule is otherwise as to a defendant who sets up such title to defeat the plaintiff's claim of possession. See Spratt vs. Price, 18 Fla., 289. *Id.*
22. When husband and wife reside upon land which is the separate property of the wife, the assessment for the purpose of taxation may be made in the name of the husband as an occupant. *Id.*
22. Under the revenue law of 1874 a tax deed duly executed is *prima facie* evidence of title and of the regularity of the proceedings from the valuation of the land by the Assessor to the date of the deed inclusive, and the burthen of proof to defeat such title is upon the person resisting the same. *Id.*
TRIAL BY COURT. See *Writ of Error*, 5.
TRANSFER OF CAUSE TO ANOTHER CIRCUIT FOR TRIAL.
A case in chancery is as much pending for the purpose of hearing a motion for an injunction when the papers are in the hands of the Judge of the Circuit Court as if they were in the clerk's office of the Circuit Court of the county in which the case is brought. The papers being thus in the hands of the Judge of the Circuit

TRANSFER OF CAUSE, &c.—(*Continued.*)
Court, he may, upon petition, find that he is disqualified, and before service of subpœna pass an order transferring the case to another Circuit. Cases of the City of Jacksonville vs. Dorman, 13 Fla., 390, and Swepson *et al.* vs. Call *et al.*, 13 Fla., 337, referred to and explained. *Fairchild* vs. *Knight*, 770.

TRUSTS AND TRUSTEES. See *Parties*, 1; *Bankruptcy*.

1. The English rule, that a trustee, executor or administrator is not entitled to compensation for his care and trouble, unless an allowance is made in the instrument creating the trust, has been qualified in this country, and the converse principle is recognized and generally established. *Muscogee Lumber Company* vs. *Hyer*, 698.
2. The laws of this State allow to guardians, executors and administrators a compensation for their services, and in analogy, upon equitable principles, a reasonable compensation should be allowed to trustees for their services, care and responsibilty incident to their position. *Id.*
3. Where a trustee holds the mere naked title to property for the use of the beneficiaries who have for years enjoyed the undisturbed possession, and the conduct of the trustee has not been such as to endanger the property or disturb its enjoyment, or show a want of integrity, capacity or fidelity, the mere fact that he forbids the beneficiaries to hold any social intercourse with himself or his family is not a sufficient ground upon which to demand the removal of the trustee. *Nichols* vs. *Philips*, 732.
4. S. with his family residing on public lands for eight years and having made valuable improvements applied to W. for a loan of $40 to enable him to enter the land. W. loans him the money, but S. not finding the land agent passes the money back to W. and requests him to make the purchase for S., and to hold the deed till the money was paid. W. enters the land in his own name and informs S. that "it is all right." S. continues to reside and make improvements on the land for five years longer until it is worth $2,500, when W. conveys the legal title to D. & M. for $700. The latter knowing the long possession of S., and of his valuable improvements, and being further informed that S. claimed to own the property subject to the payment of the money due to W. *Held:* That by the transaction between S. and W. the latter became the creditor of S., and held the land as trustee of a resulting trust in favor of S., and as security for the money advanced and interest.
5. That D. & M. having purchased with full knowledge of the settlement, occupancy and improvements by S., and that he claimed the property subject to the payment of the money advanced by

TRUSTS AND TRUSTEES—Continued.)
W., are chargeable with notice of the trust, and their purchase gave them the same standing as that of W. in respect of the trust.
6. On bill filed against W., D. & M. by S. to redeem, he is entitled to a decree that D. & M. convey to him on payment of the $40 and lawful interest. *Ward* vs. *Spivey*, 847.
UNITED STATES COURT. See *Removal of Cause to U. S. Court.*
VENDOR AND PURCHASER. See *Contracts; Judicial Sales.*
VENUE. See *Transfer of Cause.*
VERDICT. See *Ejectment*, 7.
WAIVER. See *Practice*, (*Equity*) 4.
WIDOW. See *Administrators and Executors*, 2; *Husband and Wife*, 1, 2.
WORDS AND PHRASES. *"Building," Wood* vs. *State*, 967; *"Corn-crib," Wood* vs. *State*, 967; *"Mortal Wound," Brown* vs. *State*, 472.
WRIT OF ERROR.
1. Under the statute the writ of error in a civil case, when the defendant in the Circuit court applies therefor, issues on demand as a matter of right. No bond is required in such case unless a supersedeas is desired. *Weiskoph* vs. *Dibble*, 22.
2. A *scire facias ad audiendum errores* is "process" within the meaning of the Constitution of this State. The "style" of process the Constitution provides shall be, "The State of Florida." This is a formal requirement, and if omitted may be corrected by amendment under our statute of amendment. *Id.*
3. The State is not entitled to a writ of error to reverse the judgment of the Circuit Court quashing an indictment and discharging the accused. *State* vs. *Burns*, 185.
4. Writ of error or appeal at law is the proper mode of reviewing proceedings of Circuit Court on *certiorari*. *Edgerton* vs. *Mayor Green Cove Springs*, 528; *Deans* vs. *Wilcoxon*, 531.
5. Where, by consent, there is a trial by the court, a motion for new trial upon the ground that the finding was contrary to law and evidence overruled, and exception thereon, this court, upon a writ of error, is authorized and required by Chapter 521, Laws, and other statutes, to review such action overruling the motion for new trial and to examine the evidence. *Knox* vs. *Barnett*, 594.
6. When a writ of error has been dismissed because of the failure of the plaintiff in error to file an assignment of errors, the court may at the same term, in the exercise of a sound discretion, reinstate the case on the docket. *Allen* vs. *Tison*, 628.

WRIT OF ERROR.—(*Continued.*)

7. Motion to reinstate denied, where, although the grounds of the motion, considered with reference to the failure to file such assignment, addressed themselves to the favorable consideration of the court, the record disclosed great laches on the part of plaintiff in error in the management of the case in the lower court and a total absence of merits. *Id.*

8. Plaintiffs in Error moved to docket for trial, Defendants in Error moved to dismiss the writ of error because no record of the judgment and proceedings or assignment of errors had been filed. No cause was shown for neglecting to file the assignment. Motion to dismiss granted on grounds stated, and, as further ground, because the paper on file, purporting to be a record, did not show what judgment was rendered by the court below. *Endel* vs. *Walls*, 697.

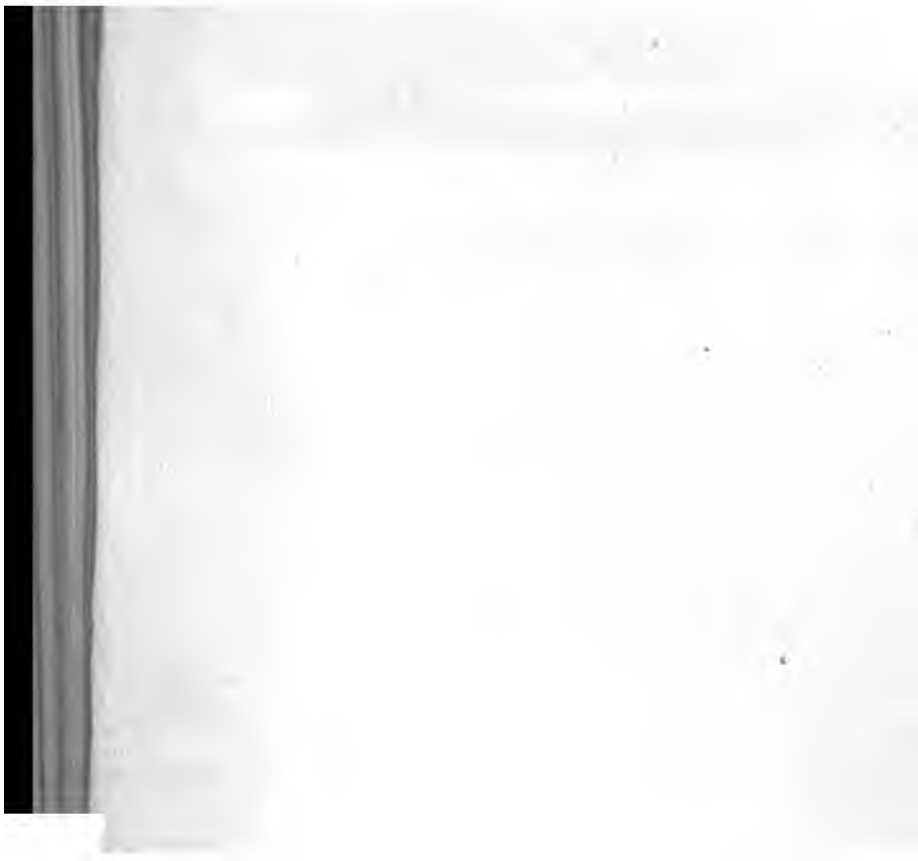
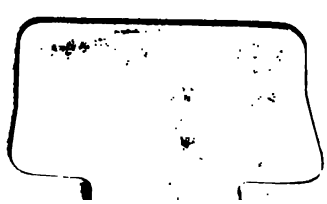
9. An order that a cause stand dismissed at plaintiff's costs, there having been no service of process upon the defendant, is a final disposition of the matter to which a writ of error lies. *Cook* vs. *Cook*, 634.

WRIT OF POSSESSION. See *Judicial Sales*, 1, 2, 4.

WRIT OF ERROR.—(*Continued.*)

7. Motion to reinstate denied, where, although the grounds of the motion, considered with reference to the failure to file such assignment, addressed themselves to the favorable consideration of the court, the record disclosed great laches on the part of plaintiff in error in the management of the case in the lower court and a total absence of merits. *Id.*

8. Plaintiffs in Error moved to docket for trial, Defendants in Error moved to dismiss the writ of error because no record of the judgment and proceedings or assignment of errors had been filed. No cause was shown for neglecting to file the assignment. Motion to dismiss granted on grounds stated, and, as further ground, because the paper on file, purporting to be a record, did not show what judgment was rendered by the court below. *Endel* vs. *Walls*, 697.

9. An order that a cause stand dismissed at plaintiff's costs, there having been no service of process upon the defendant, is a final disposition of the matter to which a writ of error lies. *Cook* vs. *Cook*, 634.

WRIT OF POSSESSION. See *Judicial Sales*, 1, 2, 4.